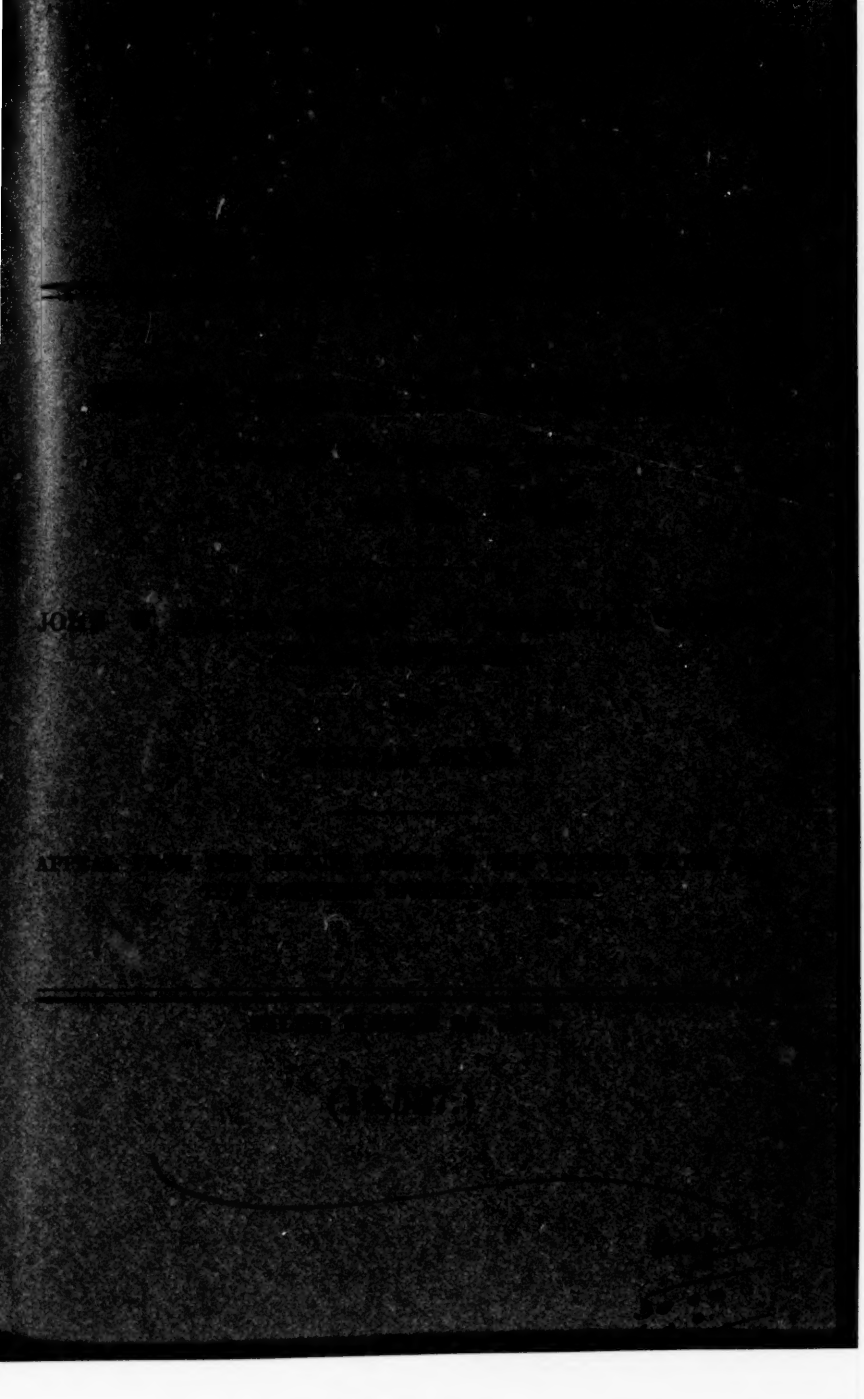

(16,537.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 758.

JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

vs.

WILLIAM GRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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1 *Caption.*

Be it remembered that at a term of the circuit court of the United States in the fifth circuit thereof and in and for the northern district of Texas, at Dallas, begun and holden at Dallas, Texas, on the 11th day of January, A. D. 1897, and which term adjourned on the 27th day of February, A. D. 1897—present and presiding, the Honorable Charles Swayne, judge of the United States district court for the northern district of Florida, by virtue of the designation and appointment by the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, as hereafter shown—during the trial of the cause hereinafter named the following proceedings were had and the following cause came on for trial and was tried, to wit:

Ex Parte WILLIAM GRICE, Relator; JOHN W. BAKER, Sheriff, Respondent. No. 2062.

2 *Designation of Hon. Charles Swayne.*

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Whereas in my opinion the accumulation of business in the district and circuit courts of the United States for the northern district of Texas requires the designation and appointment of another judge in aid of the judge of said district:

Now, therefore, I, Andrew P. McCormick, United States circuit judge for the fifth judicial circuit, in accordance with the provisions of section 592 of the Revised Statutes of the United States, do hereby designate and appoint the Honorable Charles Swayne United States district judge for the northern district of Florida, in aid of the Honorable John B. Rector, United States district judge for the northern district of Texas, to hold the terms of said courts at Waco, Texas, beginning on the 3rd Monday of November, 1896, and the terms of said courts at Dallas, Texas, beginning on the 2nd Monday in January, 1897, and to have and exercise in the northern district of Texas during the time of this designation the same powers that are vested in the judge thereof.

Witness my hand, at office, in Dallas, Texas, this the 4th day of November, A. D. 1896.

A. P. McCORMICK,
U. S. Circuit Judge.

3 *Petition for Writ of Habeas Corpus.*

Filed Dec. 9, 1896; Dec. 18, 1896.

In the Circuit Court of the United States for the Northern District of Texas, at Waco.

To the honorable the judges of said court:

Your petitioner, William Grice, who resides at Dallas, in the county of Dallas and State of Texas, comes and shows to the court as follows:

1. That he, your petitioner, is a citizen of the United States and resides, as aforesaid, in the county of Dallas and State of Texas.

2. That he, your petitioner, is unlawfully restrained in his liberty by one John W. Baker, who is the sheriff of McLennan county, Texas, and he is now held in the custody of the said John W. Baker, sheriff as aforesaid, he, your petitioner, having been surrendered by his sureties under the recognizance hereinafter mentioned. Petitioner is informed and believes, and so avers the fact to be, that he, your petitioner, is detained by the said John W. Baker by virtue of a capias issuing out of the district court of the 54th judicial district of the State of Texas, at Waco, upon an indictment preferred in said district court against your petitioner and other citizens of the United States on, to wit, the 21st day of November, 1894, said indictment and prosecution being numbered on the criminal docket of said district court for said 54th judicial district as number 871 and entitled The State of Texas *vs.* John D. Rockefeller *et al.* Said indictment charges that John D. Rockefeller, Henry M. Flagler, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruett, E. Wells, William Grice, F. A. Austin, and E. T. Hathaway did unlawfully agree, combine, conspire, confederate, and engage with William E. Hawkins and divers other persons to the grand jurors unknown in McLennan county, Texas, in a conspiracy against trade, then and there and with the said William E. Hawkins and said other persons, creating a trust by a combination of their capital, skill, and acts with the said William E. Hawkins and other persons for the purpose, design, and effect to create and carry out restrictions in trade.

4 Petitioner shows that said indictment and prosecution has for its exclusive and only basis a certain act of the legislature of the State of Texas entitled "An act to define trusts, and to provide for penalties and punishment of corporations, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889, which act is a public law of the State of Texas.

Petitioner shows that after said indictment was presented in open court a capias was duly issued thereon, and this defendant was arrested and brought to the city of Waco within a few days after the presentment of said indictment and appeared before said dis-

trict court of the 54th judicial district and entered into recognizance in terms of law conditioned for his appearance in said court from day to day and from term to term to answer said indictment; and thereafter, to wit, on the 2nd day of December, 1895, said case was regularly called for trial in said 54th judicial district, and thereupon, in accordance with the provisions of the Code of Criminal Procedure of the State of Texas, the defendants in said prosecution who has been arrested announced a severance, and immediately thereafter the said E. T. Hathaway, a codefendant, was placed on trial to answer the charges contained in said indictment.

Your petitioner further shows that the said E. T. Hathaway, codefendant, after announcement of ready for trial, and within the time prescribed by law governing such procedure, he, the said Hathaway, through his counsel, did file and present, in accordance with the provisions of the Code of Criminal Procedure of the State of Texas, his exceptions to the sufficiency and substance of the indictment preferred against him in the nature of a motion to quash as at common law, in which said codefendant, Hathaway, did set up and present the following causes and exceptions to said indictment, to wit:

1. Because it did not appear from the face of the indictment that any offense against the law had been committed.

2. Because the indictment showed upon its face that the district court of the 54th judicial district had no jurisdiction.

3. Because the act of the legislature of the State of Texas of March 30th, 1889, hereinbefore recited by its title, was violative of the Constitution of the United States, for the reason that said indictment discriminated between different classes of citizens of the United States, and denied to certain citizens the equal protection of the law, and proposed to deprive certain citizens of the United States of their liberty, property, privileges, and immunities in a way other than by due course of the law of the land.

4. Because said act of March 30th, 1889, was inoperative and void as to persons and citizens resident beyond the territorial limits of Texas.

5. Because said act did not prohibit a trust or declare it illegal, nor did it declare it an offense or propose to punish it, but merely defined it a trust without denouncing it, and was therefore not a penal law of the State of Texas, and no prosecution could be maintained under it.

6. Because said indictment showed upon its face that the parties presented were engaged in interstate commerce within the meaning of the Constitution and laws of the United States, and the district court of the 54th judicial district of Texas had no jurisdiction of any of such matters.

The court overruled these exceptions; to which the defendant Hathaway excepted; and thereafter the trial of the cause proceeded and continued until the 12th day of December, 1895, resulting in a verdict of guilty as to said codefendant, Hathaway, as charged in said indictment, and assessing his punishment at a fine of $50.00;

which verdict was received by the court and judgment duly entered thereon; and thereafter, to wit, on December 14th, 1895, the said Hathaway, codefendant, filed his motion for a new trial, setting up many grounds therefor, including the error of said district court in overruling his exceptions to said indictment, as hereinbefore set out; which motion was overruled by said district court on December 16th, 1895, and from said judgment of conviction the said Hathaway, codefendant, did perfect and prosecute, in terms of law, his appeal to the court of criminal appeals of the State of Texas, said last-named court then and there having final jurisdiction of criminal matter under the constitution and laws of the State of Texas, and he, the said Hathaway, did also file, in terms of law, his motion in arrest of judgment after conviction, setting up substantially the same grounds embraced in his exceptions *in limine* to said indictment; both of which motions for new trial and in
6 arrest of judgment were overruled by said district court; to which rulings of the court said codefendant, Hathaway, did duly except, and thereafter did perfect and prosecute his appeal to said court of criminal appeals of the State of Texas on various assignments of error, including the matters set up in said exceptions to the indictment and in said motion in arrest of judgment.

Your petitioner further shows to the court that under the provisions of the Code of Criminal Procedure of the State of Texas and of the criminal laws of the State of Texas, including the particular act aforesaid of 1889, said conviction of his codefendant, Hathaway, was for a felony, notwithstanding the pecuniary fine imposed, and, under said laws and provisions of said Code of Criminal Procedure, he, the said Hathaway, codefendant, was subjected to confinement in the common jail of McLennan county, Texas, pending the determination of said appeal. Your petitioner is advised and believes, and so avers, that said appeal on the part of his codefendant, Hathaway, was prosecuted with diligence and upon the assignments of error hereinbefore recited; that the transcript of the case on appeal was promptly filed in said court of criminal appeals of the State of Texas, sitting at Dallas, Texas, on, to wit, about the 10th day of January, 1896, and thereafter, to wit, about the 29th day of January, 1896, said appeal of said Hathaway, codefendant, was argued by counsel, both for himself, as appellant, and counsel for the State, and was submitted to said court of criminal appeals for consideration and determination; yet, notwithstanding the premises, said court of criminal appeals of the State of Texas failed to decide said appeal at its said Dallas term, which ended on the 31st day of March, 1896, and thereafter transferred said appeal for its determination to its Austin term, beginning on the first Monday in April, 1896, and there detained the same, without action on its part, until about the 24th day of June, 1896, leaving the said appellant, Hathaway, codefendant of this petitioner, in the meanwhile to be incarcerated in the common jail of McLennan county, Texas, in the companionship of thieves and felons of almost every character and description, whereupon, on or about the 24th day of June, 1896, said court of criminal appeals handed down its decision in said case, wherein it failed, de-

clined, and refused to decide or pass upon the exceptions to the sufficiency of the indictment aforesaid, which was duly raised in
7 the court below and duly presented to said court by assignment of error and by argument, and which involved the dearest rights not only of the said Hathaway, codefendant, who was appellant therein, but of your petitioner and all other good citizens of the United States, and which appeal called for an adjudication by said court of criminal appeals of the State of Texas upon said rights; but notwithstanding the premises, said court of criminal appeals decided said appeal upon a technical ground of pleading, holding in effect that because the indictment presented in said case had failed to charge the appellant Hathaway with having knowingly carried out, as agent, the stipulations, purposes, prices, rates, or orders under said alleged conspiracy, that thereafter the admission of evidence to that effect over the objection of said defendant, Hathaway, was unwarranted in law, and that said conviction was invalid; and thereupon, for said cause and without considering and determining the rights of said appellant, Hathaway, in any manner whatsoever as a citizen of the United States under the Constitution, it, said court of criminal appeals, reversed said judgment and remanded said cause for a trial *de novo* in said district court of the 54th judicial district of the State of Texas.

Your petitioner further shows that since the rendition of said judgment by said court of criminal appeals in said case two terms of said district court of the 54th judicial district have been held, one of which is now nearing its close, and while this petitioner, together with his codefendants, who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants not only to the shame and contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner as well *and* his codefendants are without remedy in the State courts of Texas for the assertion and vindication of their rights under the Constitution of the United States.

Your petitioner further shows that on, to wit, the 24th day
8 of November, 1896, his said codefendant, E. T. Hathaway, in terms of law and upon due showing made, did procure from this honorable court its most gracious writ of *habeas corpus* commanding and requiring John W. Baker, sheriff of McLennan county, who then and there had and held the custody of the body of the said E. T. Hathaway, codefendant, to produce before this honorable court the body of said Hathaway, and then and there certify to this honorable court the true cause of the detention by him, the said Baker, of the said Hathaway; which writ of *habeas corpus* was on the same day, to wit, on the 24th day of November, 1896, duly served upon the said John W. Baker, who made return on the same day to said writ of *habeas corpus* in this honorable

court, wherein he certified that he held *to* body of the said E. T. Hathaway, codefendant of your petitioner, by virtue of a capias issued upon the indictment hereinbefore described, presented in the 54th judicial district of Texas, at the time specified and named and in the suit therein named, to wit, The State of Texas *vs.* John D. Rockefeller *et al.*, the said Hathaway being indicted, as stated in his application for writ of *habeas corpus*, for violation of the anti-trust statute of the State of Texas, enacted and approved on March 30th, 1889, and thereupon it pleased this honorable court to set said cause for hearing in open court for the 7th day of December, 1896, and due notice was issued by this honorable court to the said respondent and to the prosecuting officers of the county of McLennan and State of Texas, duly advising them of such proceedings, it being here shown that the application of said E. T. Hathaway, codefendant, for a writ of *habeas corpus*, as aforesaid, was based exclusively upon the ground that he was a citizen of the United States, and that the law under which said indictment had been presented was violative of the Constitution of the United States in the particulars stated in his exceptions thereto filed upon the trial of said cause.

Your petitioner shows that the prosecuting officers of the State of Texas, in the district court of the 54th judicial district of said State, for reasons which are not known to your petitioner, but which reasons your petitioner believes were obviously for the purpose of defeating the jurisdiction of this honorable court in the premises upon said writ of *habeas corpus* and for the purpose of preventing
9 this honorable court from passing upon the constitutional rights of said E. T. Hathaway, codefendant of this petitioner, as a citizen of the United States, did, on, to wit, the 7th day of December, in open court, in said district court of the 54th judicial district, and with the consent of said court, dismiss the said indictment and prosecution as to the said E. T. Hathaway, codefendant, leaving the same to stand unimpaired and unaffected as to your petitioner and his other codefendants in said prosecution, and thereafter, on the same day, to wit, on the 7th day of December, 1896, the said John W. Baker, sheriff as aforesaid, respondent in the said writ of *habeas corpus*, did file his amended return to said writ, wherein he submitted to this honorable court a copy of said judgment of dismissal of said district court of the 54th judicial district of the State of Texas, and did further certify that, by reason of said dismissal, he, the said John W. Baker, as sheriff as aforesaid, had and claimed no further right or custody over the relator, E. T. Hathaway, and thereby and by reason thereof the jurisdiction of this honorable court in the premises was practically and substantially terminated, and this court was denied the privilege, under the law, of determining whether or not said act of the legislature of the State of Texas approved March 30th, 1889, and commonly known as the anti-trust act, was or was not violative of the Constitution of the United States and violative of the rights, privileges, and immunities of your petitioner, as well as his codefendants, under the Constitution of the United States and as citizens thereof.

Your petitioner is advised by his counsel, and upon the faith of

such advice avers, that said act of the legislature of the State of Texas of March 30th, 1889, is violative of the Constitution of the United States, and is therefore null and of no effect, for the reasons stated in said exceptions to said indictment hereinbefore recited; that said act discriminates between different classes of citizens of the United States and denies to certain citizens and classes of citizens the equal protection of the laws; that it deprives certain citizens and classes of citizens of the United States of their liberty, privileges, and immunities in a way other than by due course of the law of the land; that it otherwise attempts to justify the exercise of extraterritorial jurisdiction on the part of the State of Texas over citizens of the United States residing in other
10 States of the American Union and over acts done in other States of the American Union, and over which the State of Texas can have no possible jurisdiction, and that said acts and the indictment against your petitioner and others as aforesaid is an attempt to regulate and to interfere with interstate commerce, all in violation of the Constitution of the United States.

Your petitioner further shows to the court that by reason of the premises he is without remedy for the assertion and vindication of his rights as a citizen of the United States under the Constitution thereof; that he has stood under indictment for felony, charged with the violation of said alleged statute of the State of Texas, approved March 30th, 1889, for a period of two years without being afforded an opportunity by the State courts of Texas for the assertion of his rights as aforesaid as a citizen of the United States. Your petitioner believes, and so avers, that it is the purpose and intent of the prosecuting authorities of the State of Texas to prevent, if possible, any appeal by this petition to the courts of the United States for the vindication of his rights as aforesaid as a citizen. In view of the premises herein recited and without the interposition of this honorable court for his due protection and the due conservation of his rights as a citizen of the United States, he is practically remediless by appeal in regular course or otherwise.

And so your petitioner comes and prays this honorable court for its most gracious writ of *habeas corpus*, directed to the said John W. Baker, sheriff of McLennan county, Texas, as aforesaid, commanding him and requiring him, the said Baker, to produce before this court instanter the body of your petitioner, which he now unlawfully holds in his custody, to the end that the cause of detention of this petitioner may be promptly and summarily inquired into by this honorable court in accordance with the laws of the United States in such cases made and provided, and that it may please the court upon the hearing of said writ of *habeas corpus* to order and direct the discharge of this petitioner from the custody of said Baker, sheriff as aforesaid. Your petitioner filed herewith as exhibits the following papers, to wit:

1. Copy of the indictment preferred in said cause against your petitioner and others.

11 2. Copy of the judgment of the district court of the 54th judicial district adjudging his codefendant, Hathaway, guilty.

3. A copy of the brief and argument of your petitioner's codefendant, Hathaway, in the court of criminal appeals of the State of Texas.

4. A copy of the opinion of said court of criminal appeals of the State of Texas.

5. And petitioner refers to the records of this court in the matter of the application of *ex parte* E. T. Hathaway and prays that they may be considered a part and parcel of this petition, and your petitioner prays that these papers filed herewith may be read and considered by the court upon the final hearing hereof also as a part of this his petition for *habeas corpus*.

And, as in duty bound, your petitioner will ever pray.

WM. GRICE.

THE STATE OF TEXAS, }
McLennan County. }

Before me, Thos. P. Stone, a notary public in and for the county of McLennan and State of Texas, on this day personally appeared Wm. Grice, to me known to be the person whose name is signed to the foregoing petition and who, being by me duly sworn, does depose and say that he is acquainted with the contents of said petition for writ of *habeas corpus*, and that the allegations and statements in said petition contained are true.

WM. GRICE.

Sworn to and subscribed before me this the 9 day of December, A. D. 1896.

THOS. P. STONE,

[SEAL.] *Notary Public, McLennan County, Texas.*

The foregoing has the following endorsement, to wit:

Exhibit "A." No. 655. 2062. *Ex parte* Wm. Grice. Petition for writ of *habeas corpus*. Filed Dec. 9, 1896. J. H. Finks, clerk. Filed Dec. 18, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

12 *Indictment in the State Court.*

In the name and by the authority of the State of Texas:

The grand jurors for the county of McLennan, State of Texas, duly elected, tried, empannelled, sworn, and charged at a term of the district court of the fifty-fourth judicial district of Texas, in and for McLennan county, beginning on the 1st Monday of November, A. D. 1894, to enquire of and true presentment make of all offenses committed within the body of said county of McLennan, upon their oaths in said district court present—

That in said county of McLennan, State aforesaid, on or about October 1, 1894, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, Wm. Grice, E. T. Hathaway, and F. A.

Austin did unlawfully agree, combine, conspire, confederate, and engage with William E. Hawkins and divers other persons to the grand jurors unknown in a conspiracy against trade then and there with the said William E. Hawkins and the said other persons, creating a trust by a combination of their capital, skill, and acts with the said William E. Hawkins and other persons, for the design, purpose, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, by keeping the price of said oils at a certain price per gallon and at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, production, sale trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of said products, and to raise the price thereof above the true market value and cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities and products of prime necessity to the people and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, whereby the prices thereof were and are established and fixed in said county of McLennan at a fictitious value greatly in excess of the true market value; and the said John D. Rockefeller, Henry M. Flagler, William Rockefeller, Benjamin Brewster, John D. Archbald, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, Wm. Grice, E. T. Hathaway, and F. A. Austin did then and there unlawfully make and enter into a trust, combination, contract, agreement, obligation, and conspiracy with the said William E. Hawkins and other persons in said county, and all of said persons did agree, combine, conspire, confederate, and engage with each other and among themselves that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils below a certain price, which price was and is far above the true market value of said commercial commodity, and that they would fix and keep the price of said oils in said county at a certain price and graduated figure, and that for the purpose of establishing and setting the prices of said oils among themselves and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of said oils they agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade, and shipment of said oils, so that the price thereof would be affected and fixed at a certain figure, against the peace and dignity of the State.

13

Second Count.

And the grand jurors aforesaid upon their oaths in said court do further present that John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins did unlawfully agree, combine, conspire, and confederate with
14 each other and among themselves in McLennan county, State of Texas, on or about the first day of October, 1894, in a conspiracy against trade, then and there creating a trust by a combination of their capital, skill, and acts with each other, for the purpose, design, and effect to carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being articles of trade and commercial commodities, by keeping the price of said oils at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, sale, trade, and shipment of petroleum, petroleum oils, all their products, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of said products and to raise the price thereof above the true market value, and to cause the same to be purchased by the actual consumers at a great price, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all their products, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities and products of prime necessity to the people, and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, all their products, refined oils, illuminating oils, and lubricating oils, whereby the prices thereof were and are established and fixed in the said county of McLennan, State of Texas, at a fictitious value, greatly in excess of the true market value; and the said John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finlay, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins did then and there unlawfully make and enter into a trust, combination, conspiracy, contract, agreement, and obligation, and did unlawfully agree, combine, conspire, confederate, and engage with each other and among themselves that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, all their products, refined oils, illuminating oils, and lubricating oils below a certain price, which price was and is far above the true market value of said products and commercial commodities, and that they would (and did fix) fix and keep
15 the price of said oils in said county and in said State at a certain price and graduated figure, and that for the purposes

of establishing the prices of said oils and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of petroleum, its products, refined oils, illuminating oils, and lubricating oils, the said above-named persons agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade, and shipment of said products and oils so that the price thereof would affect and fix at a certain figure, and the prices of said oils were affected and fixed at a certain figure, and free and unrestricted competition in said products and articles of trade was destroyed and prevented.

That the prices of said oils were fixed and established, and free and unrestricted competition in the manufacture, production, sale, trade, and shipment of said oil was prevented and destroyed in the following manner: All of said above-named persons, in connection with divers other persons to the grand jurors unknown, would bring their oils into the various towns of Texas and in McLennan county, and where they found competition in the sale of their oils would immediately cut prices far below a profitable selling price and, by reason of their immense power, wealth, fortunes, trusts, mutual combination, and monopoly, keep said prices at said unprofitable figures until all competition had fled the town and had been wiped out and destroyed, when they would raise the prices of their oils far above the true market price and exact an exorbitant figure from the actual consumers of their oils and there keep fixed and established said unjust prices, against the peace and dignity of the State.

Third Count.

And the said grand jurors aforesaid upon their oaths in said court do further present that John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, E. T. Hathaway, F. A. Austin, and William E. Hawkins did unlawfully agree, combine, conspire, and confederate with each other and divers other persons in McLennan county, State of Texas, on or about October first, 1894,
16 in a conspiracy against trade, then and there creating a trust by a combination of their capital, skill, and acts with each other, for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the sale of petroleum, its products, coal oil and lubricating oil, the same being articles of trade and commercial commodities, by increasing the price to actual consumers thereof in McLennan county by agreeing among themselves that where they found competition in the sale of their oils that they would bring their said oils into the various towns in McLennan county, State of Texas, and reduce the prices of their commercial commodities far below a profitable selling price, and by reason of their immense power, wealth, fortunes, trusts, mutual combinations, and monopoly keep said prices at said unprofitable figure until all competition was crushed and destroyed and their weak competitors had fled the market, when the said persons above named would

raise the prices of their said oils far above the true and honest market price and exact an exorbitant and unreasonable figure from the actual consumers of their said oils, and there keep fixed and established said unjust and unreasonable prices, and that by said means said persons did so increase the prices of petroleum, its products, coal oil and lubricating oil, against the peace and dignity of the State.

Fourth Count.

And the said grand jurors aforesaid upon their oaths in said court do further present that John D. Rockefeller, Henry M. Flagler, William Rockefeller, Benjamin Brewster, John D. Archbald, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and William E Hawkins did unlawfully agree, combine, conspire, and confederate with each other and with other persons to the grand jurors unknown, on or about the 1st day of October, 1894, in McLennan county, State of Texas, in a conspiracy against trade, then and there creating a trust by a combination of their capital, skill, and acts with each other and for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, and sale of petroleum, its products, coal oil and lubricating oils, the same being articles
17 of trade and commercial commodities, by preventing competition in the manufacture, production, sale, and transportation of petroleum, its products, refined oils, illuminating oils, and lubricating oils, by agreeing among themselves that where they found competition in the sale of their oils that they would bring their said oils into the various towns in McLennan county, State of Texas, and reduce the prices of their various commodities far below a profitable selling price, and by reason of their immense powers, wealth, fortunes, trusts, mutual combinations, and monopoly keep said prices at said unprofitable figures until all competition was crushed and destroyed and their weak competitors had fled the market, when the said persons above named would raise the market prices of their said oils far above the true and honest market price and exact an exorbitant and unreasonable figure from the actual consumers of their said oils, and there keep fixed and established said unjust and unreasonable prices, and that by said means said persons did so crush competition in the manufacture, production, sale, and transportation of petroleum, its products, refined oil, illuminating oil, and lubricating oil, against the peace and dignity of the State.

Fifth Count.

And the grand jurors aforesaid upon their oaths do further present that in said county of McLennan, State of Texas, on or about the 1st day of October, 1894, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice,

E. T. Hathaway, F. A. Austin, and William E. Hawkins did unlawfully agree, combine, conspire, and confederate with each other and with divers other persons to the grand jurors unknown in a conspiracy against trade, then and there creating a trust by a combination of their capital, skill, and acts with each other, for the purpose, design, and effect to carry out restrictions in trade, to wit, in fixing and establishing at a certain standard and figure the price of petroleum, its products, refined oil, illuminating oils, lubricating oils, whereby the prices to the public were controlled and established, the same being articles of trade and commercial commodities, by agreeing among themselves that where they found com-
18 petition in the sale of their oils they would bring their said oils in the various towns of the county of McLennan, State of Texas, and reduce the prices of their commodities far below a profitible selling price, and by reason of their immense power, wealth, fortunes, trusts, mutual combinations, and monopolies keep said prices at said unprofitable figures until all competition was crushed and destroyed and their weak competitors had fled the market, when the said persons above named would raise the prices of their said oils far above the true and honest market price and exact an unreasonable and exorbitant figure from the actual consumers of their said oils, and there keep fixed and established said unreasonable and exorbitant prices, and by said means said persons did keep fixed at a certain standard the prices of petroleum, its products, refined oils, kerosene, and lubricating oils, in such a manner that the prices to the public were controlled and established, and that said oils are commercial commodities and of prime necessity for use and consumption by the public in this State, against the peace and dignity of the State.

Sixth Count.

And the grand jurors aforesaid upon their oaths in said court do further present that on or about the 2nd day of January, A. D. 1882, a great many corporations, partnerships, firms, and individuals controlling, owning, and operating 95 per cent. of the capital invested in petroleum, its products, refined oils, illuminating oils, and lubricating oils, and in the manufacture, sale, and transportation thereof, met at some place in the United States to the grand jurors unknown and organized themselves into a trust, combination, conspiracy, and confederation with each other and among themselves to organize a monopoly to control the oil trade in the United States; that there were about thirty-nine corporations, partnerships, firms, and individuals who entered into and bound themselves by said trust, conspiracy, combination, and agreement, and that they were scattered over many States of the United States, and owned, controlled, and operated almost the entire petroleum-
19 oil industry of the United States, and that the purposes of said trust, conspiracy, combination, and agreement were to organize said corporations, partnerships, firms, and individuals into an agreement, combination, and trust to be known as

the "Standard Oil trust," for the purposes of mining, manufacturing, refining, and dealing in petroleum and all its products and all the material used in such business, and transact other business collateral thereto, and for such other purposes and powers as should be embraced in the several charters, such as should seem expedient to the parties thereto procuring charters; that, aside from the ostensible purposes already mentioned, the agreement, conspiracy, and trust were created and organized for the purpose of absorbing and controlling and monolopizing the petroleum-oil industry of the United States, and that said thirty-nine corporations, partnerships, firms, and individuals also entered into and organized said agreement, conspiracy, trust, confederation, and combination known as the "Standard Oil trust," for the purposes of, first, creating and carrying out restrictions in trade; second, of limiting the production and increasing the price of petroleum and its products, the same being a commercial commodity; third, of preventing competition in the making, manufacture, and transportation and sale of petroleum oil and its products; fourth, of fixing at a certain standard and figure the price of petroleum oil and its products, whereby their prices to the public would be controlled and established, and said products being of prime necessity to the people for use and consumption; fifth, for the purpose of binding themselves not to sell, dispose of, and transport petroleum oil and its products at a fixed and graduated figure, and to establish and settle the price of petroleum and its products at such figures so as to preclude a free and unrestricted competition in making, manufacturing, sale, and transportation of petroleum and its products, and for the purpose of pooling and combining their interests in the making, manufacture, sale, and transportation of petroleum and its products in such a manner that the price thereof would be affected, the said petroleum oil and its products being an article of trade and commercial commodity; that each of said corporations, partnerships, firms, and individuals agreed among themselves and with said trust to form in the States where they were respectively domiciled a corporation known as the "Standard Oil Company" of the State where formed, and to become a part of the trust known as the "Standard Oil trust," and that many such corporations, in pursuance of such agreement and trust, became a member and part of said "Standard Oil trust." The corporations, partnerships, firms, individuals, and corporations formed in pursuance of the agreement mentioned agreed to transfer and assign, and did transfer and assign, all their stock to nine trustees of the "Standard Oil trust," to be held by said trustees indefinitely; that the said corporations, partnerships, firms, and individuals agreed that nine trustees should be appointed to take charge of, control, and operate the affairs of the "Standard Oil trust," and that a certain number of trustees should be elected annually, after the election of the original trustees; that said trustees were required, empowered, and authorized to issue trust certificates to said corporations, partnerships, firms, and individuals in consideration for their said stock delivered and transferred to said trustees; that the value of said trust certificates so

issued amounted to many millions of dollars; that the general office of said "Standard Oil trust" should be in New York city; that the meetings should be there held and the trustees should be elected in New York city, and that the headquarters and general offices of the said nine trustees should be and remain in New York city; that the said corporations, partnerships, firms, and individuals then and there, on the 2nd day of January, 1882, agreed and contracted that the "Standard Oil trust" should be perpetual, and that it has existed since said agreement and trust, and that its general offices and headquarters and the general offices and headquarters of the said trustees are now situated and located in New York city, State of New York, pursuing and carrying out the purposes of said trust, conspiracy, combination, contract, and confederation, as hereinbefore detailed and stated; that said trustees are now engaged in carrying out, enforcing, and executing the terms and provisions of said trust, combination, conspiracy, and contract between said corporations, partnerships, firms, and individuals, and said "Standard Oil trust" is now in full force and effect and have been since the 2nd day of January, 1882, controlling, managing, and directing ninety-five per cent. of the capital invested in the petroleum industry, and that the value of said trust certificates now in
21 existence is about $200,000,000; that the trustees of the "Standard Oil trust" now in office are composed of the following-named persons, to wit, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, and Wesley H. Tilford, and that said trustees are now carrying out, enforcing, and executing the trust agreement and conspiracy hereinabove set out; that said trustees have divided the market for petroleum oil and its products into various subdivisions between the members of the "Standard Oil trust," allotting to each corporation, firm, member, or individual of said trust a certain State or States in which to have the exclusive right to sell petroleum oil and its products; that the Waters-Pierce Oil Company, a corporation domiciled in the State of Missouri, has been allotted the market and territory lying in the States of Missouri, Arkansas, Louisiana, and Texas, and had the exclusive right to sell petroleum oil and its products in said States, and that the other members of said "Standard Oil trust" are bound by said trust not to invade said territory and sell therein; that the Waters-Pierce Oil Company has the exclusive right under said trust to sell petroleum oil and its products in Texas and in McLennan county, Texas; that the officers of said Waters-Pierce Oil Company are as follows: Henry Clay Pierce, president; Arthur M. Finley, vice-president; C. M. Adams, treasurer; J. P. Gruet, secretary, and E. Wells, auditor, and that Arthur M. Finley, vice-president, lives in Galveston, State of Texas; that said trustees of the said "Standard Oil trust" and said officers of the Waters Pierce Oil Company, in pursuance of the trust, agreement, and conspiracy hereinbefore set out, have subdivided Texas into four grand divisions in which to sell the oils of the Waters-Pierce Oil Company, and have appointed an agent for each grand division and many local agents for the various towns and

counties of Texas, and in McLennan county, State of Texas, to sell their said oils; that various local agents are acting under the supervision, direction, and orders of said trustees and said officers of the said Waters-Pierce Oil Company and send daily reports of their said sales of oil to said trustees and officers; that William E. Hawkins, among many others, is the representative and local agent in McLennan county, State of Texas, and by agreement is acting with, conspiring,
and confederating with said trustees of the "Standard Oil
22 trust" and the said officers and agents of the Waters-Pierce Oil Company, and is carrying out, enforcing, and executing in McLennan county, State of Texas, all the provisions, terms, and stipulations of said trust, conspiracy, contract, combination, and confederation, and was so doing on the first day of October, 1894; that on or about October 1, 1894, in McLennan county, State of Texas, in strict pursuance of and in accordance with said designs, agreements, trusts, combinations, conspiracy, contract, and confederation and to carry out and execute said purposes, as hereinbefore detailed and set out, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins did unlawfully agree, combine, conspire, and confederate with each other and among themselves and with divers other persons in McLennan county, to the grand jurors unknown, in a conspiracy against trade, then and there creating a trust, by a combination of their capital, skill, and acts with each other for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being articles of trade and commercial commodities, by keeping the price of said oils at a certain price per gallon or at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, production, sale, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of said products, and to raise the price thereof above the true market value, and to cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all their products, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities and products of prime necessity to the people, and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum
oils, their products, refined oils, illuminating oils, and lubricat-
23 ing oils, whereby the prices thereof were and are established and fixed in the said county of McLennan, State of Texas, at a fictitious value greatly in excess of the true market value, and did then and there unlawfully make and enter into a trust, com-

bination, contract, agreement, obligation, and conspiracy and did unlawfully agree, combine, conspire, confederate, and engage with each other that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, their products, refined oils, illuminating oils, and lubricating oils, below a certain price in McLennan county, State of Texas, which price was and is far above the true market value of said products, and that would fix (and did fix) and keep the price of said oils in said county and in said State at a certain price and graduated figure, and that for the purposes of establishing the prices of said oils and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of petroleum, its products, refined oils, illuminating oils, and lubricating oils, all the above-named persons agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade, and shipment of said products and oils, so that the price thereof would be affected and fixed at a certain figure, and the prices of said oils were affected and fixed at a certain figure, and free and unrestricted competition in said oils, products, and articles of trade was prevented and destroyed; that the prices of said oils were fixed and established and free and unrestricted competition prevented in the following manner, to wit: All of the above-named persons, in connection with divers other persons to the grand jurors unknown, would bring their oils into the various towns in Texas and into McLennan county, State of Texas, and where they found competition in the sale of their oils would immediately cut prices far below a profitable selling price and would not sell their oils to any dealer who would not agree not to purchase any competitive oils, and by reason of their immense power, wealth, fortunes, trusts, mutual combinations, and monopolies keep said prices at said unprofitable figures until all competition had been crushed and destroyed and all competitors had fled the market and towns of said State and McLennan county, when they would raise the prices of their oils far above the true and honest market prices and exact unreasonable and exorbitant prices from the actual consumers
24 and then and there keep fixed and established said prices; that in the manner, by the methods, and through the trusts hereinbefore described the said persons have carried restrictions in trade, increased the price of petroleum, its products and oils, and have destroyed competition in the manufacture, sale, and transportation of oils, and have fixed the prices of oils as a standard figure so as to control the price thereof to the public, and have pooled, combined, and united their interests in the manufacture, sale, and transportation of oils in such a manner as to affect the price thereof, and have greatly increased the prices of oils to the people in McLennan county, State of Texas; that the Waters-Pierce Oil Company, acting with said trusts, controls and manages 99 per cent. of the oil business of Texas, and that said business amounts to half a million barrels annually, against the peace and dignity of the State.

GEORGE T. KEEBLE,
Foreman of the Grand Jury, McLennan County, Texas.

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THE STATE OF TEXAS, }
County of McLennan. }

I, B. E. Sparks, clerk of the district court within and for said county and State, do hereby certify that the above and foregoing is a true and correct copy of the original indictment now on file in this court.

Witness my hand officially and the seal of said court, hereto affixed, at office, in the city of Waco, this the 20th day of April, 1895.

[L. S.]

B. E. SPARKS,
Clerk District Court, McLennan County, Texas,
By R. W. SANFORD, *Deputy.*

25 *Judgment in Case No.* 871—*The State of Texas vs. Jno. D. Rockefeller et al.*

THE STATE OF TEXAS
vs.
JNO. D. ROCK-FELLER *et al.* } No. 871. November Term.

DEC. 2ND, 1895.

This day this cause was called for trial, and the State appeared by her county attorney, and the defendant E. T. Hathaway appeared in person and by counsel, and the State and defendant announced ready for trial, after having severed from his codefendants and after all defendants agreed that he might be placed upon trial first, and the defendant E. T. Hathaway in open court pleaded not guilty to the charge contained in the indictment herein.

Thereupon a jury, to wit, B. H. Cherry and eleven others, was duly selected, empannelled, and sworn, who, having heard the indictment read and the defendant E. T. Hathaway's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards, on the 12th day of December, 1895, were brought into open court by the proper officer, the defendant E. T. Hathaway being present, and in due form of law returned into open court the following verdict, to wit:

"We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at a fine of $50.00 (fifty dollars).

B. H. CHERRY, *Foreman.*"

Which verdict was received by the court.

It is therefore considered and adjudged by the court that the defendant E. T. Hathaway is guilty of the offense of conspiracy against trade as found by the jury, and that he be punished, as has been determined by the jury, by the payment of a fine of $50.00. It is therefore hereby ordered, adjudged, and decreed by the court that the State of Texas do have and recover of and from E. T. Hathaway, defendant, the sum of fifty ($50.00) dollars, together with all costs of this prosecution, for which let execution issue, and that

said defendant, E. T. Hathaway, be remanded to the custody of the sheriff of McLennan county until he shall have paid said fine; and further ordered that should said defendant, E. T. Hathaway,
26 escape from said custody before he shall have paid said fine, *capias profine* issue for his arrest.

THE STATE OF TEXAS, }
County of McLennan. }

I, Jno. H. Sears, clerk of the district court within and for said county and State, do hereby certify that the above and foregoing is a true and correct copy of the original judgment in cause No. 871, The State of Texas *vs.* Jno. D. Rockefeller *et al.*, as same appears in vol. 1, page 164, of the Criminal Minutes of the 54th Judicial District Court of McLennan County, Texas.

Witness my hand officially and the seal of said court hereto affixed, at office, in the city of Waco, this the 1st day of March, 1897.

JNO. H. SEARS,
Clerk District Court, McLennan County, Texas,
[SEAL.] By W. M. McCLAIN, *Deputy.*

27 *Sentence of E. T. Hathaway in Cause* # 871, *in 54th Judicial District Court, McLennan Co.*

THE STATE OF TEXAS }
vs. } # 871. November Term, 1895.
JNO. D. ROCKEFELLER *et al.* }

DECEMBER 16TH, 1895.

This day this cause was again called, and the State appeared, by her county attorney, and the defendant E. T. Hathaway was brought into open court in person, in charge of the sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term, and thereupon said defendant, E. T. Hathaway, was asked by the court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, except that he had given notice of appeal in accordance with the law; whereupon the court proceeded in the presence of said defendant, E. T. Hathaway, to pronounce sentence against him as follows:

It is the order of the court that the defendant E. T. Hathaway, who has been adjudged to be guilty *guilty* of conspiracy against trade, and whose punishment has been assessed by the verdict of the jury at the payment of a fine of $50.00, be committed to the custody of the sheriff of McLennan county, Texas, immediately, and by said sheriff confined in the county jail of McLennan county, Texas, until the, the said defendant, shall have fully paid the fine.

STATE OF TEXAS, }
County of McLennan. }

I, Jno. H. Sears, clerk of the district court of McLennan county, do hereby certify that the above and foregoing is a true and correct copy of the sentence in cause No. 871, The State of Texas *vs.* Jno. D. Rockefeller *et al.*, as recorded in Criminal Minute Book 1, page 378, of the 54th judicial district court of McLennan county, Texas.

In witness whereof I set my hand and seal of office, at office,
28 in the city of Waco, on this the 1st day of March, 1897.

JNO. H. SEARS,
Clerk D. C., McL. Co., Texas,
[SEAL.] By R. V. McCLAIN, *Deputy.*

29 *Brief of Appellant in Hathaway vs. State of Texas.*

In the Court of Criminal Appeals, at Dallas, January Term, 1896.

E. T. HATHAWAY, Appellant, }
vs. } No. —.
STATE OF TEXAS, Appellee. }

Appeal from the district court of the 54th judicial district for McLennan county.

Brief of appellant.

This is an appeal from a conviction for the offense of a "conspiracy against trade" under an act of the legislature of the State of Texas entitled "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889.

The indictment in this case was presented in the district court of the fifty-fourth judicial district for McLennan county on the 21st day of November, 1894, and the cause was docketed as number 871, The State of Texas *vs.* John D. Rockefeller *et al.* This indictment charged that John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Grewett, E. Wells, William Grice, E. T. Hathaway, and F. A. Austin did unlawfully agree, combine, conspire, confederate, and engage with William E. Hawkins and divers other persons to the grand jurors unknown, in McLennan county, in a conspiracy against trade, then and there with the said William E. Hawkins and said other persons creating a trust by a combination of their capital, skill, and acts with the said William E. Hawkins and other persons, for the purpose, design, and effect to create and carry out restrictions in trade. (R., pp. 1, 2.)

The indictment contains six counts and covers every phase and

feature of said act, the title to which is above recited. This
30 indictment may be found in the Record, pages 1 to 15, and a certified copy thereof is herewith printed as appendix "A" to this brief for the convenience of the court.

The first count of said indictment charges all the parties named with combining with William E. Hawkins, in McLennan county, with the design to create and carry out restrictions in trade in the manufacture, production, sale, trade, and shipment of petroleum oils., etc., by keeping the price of said oils far above the true market price and for the purpose of preventing competition in such manufacture, production, sale, etc., of petroleum oils, and to limit and reduce the production of such oils, and to raise the price thereof above the true market value, and to cause the same to be purchased by consumers at a great price above the true market value, and to prevent competition in its manufacture, production, sale, etc., and to fix at a certain standard and figure the price of such oils in McLennan county, Texas, at a fictitious value greatly in excess of the true market value, and for this purpose the said parties did make and enter into a trust, contract with the said Hawkins and other persons in McLennan county, and did agree to pool their interest in the manufacture, production, sale, etc., of oils, so that the price thereof would be fixed at a certain figure. (R., 1–3.)

The second count in the indictment charges that John D. Rockefeller and others above named, including William E. Hawkins, did combine and conspire with each other in McLennan county, about the first day of October, 1894, in a conspiracy against trade, and then and there creating a combination of their capital, skill, and acts for the purpose, design, and effect to create and carry out restrictions in trade in the manufacture, production, sale, etc., of petroleum oils by keeping the price of said oils at a certain price per gallon, which price was far above the true market value, and for the purpose and effect to prevent competition in such manufacture, production, sale, etc., of petroleum, and to limit and reduce the production of said products, and to raise the price thereof above the true market value, to the detriment of consumers, and to prevent competition in the manufacture, production, sale, etc., of such oils,
and for the purpose of fixing at a certain standard figure
31 the price of such oils, whereby the prices were established and fixed in the county of McLennan at a fictitious value greatly in excess of the true market value, and that said parties named did engage and agree with each other that they would not manufacture, produce, sell, trade, and ship petroleum oils below a certain price, which price was far above the true market value, and that they would and did fix and keep the price of such oils in said county at a certain price and graduated figure, and for the purpose of precluding and destroying free and unrestricted competition such persons agreed to pool their interest in such manufacture, production, sale, etc., of oils, so that the price would be fixed at a certain figure, and the prices were fixed at a certain figure and free and unrestricted competition was destroyed in the manner following, to wit: That all of the defendants, in connection with divers

others persons unknown, would bring their oils into Texas towns and in McLennan county, and wherever they found competition would immediately cut prices far below a profitable selling price, and by reason of their power and wealth would keep prices at such unprofitable figure until all competition had fled and been destroyed, when they would raise prices far above the true market price, etc. (R., pp. 3–5.)

The third count of the indictment charges the parties named, including Hawkins, with the combination and conspiracy against trade and carrying out a trust in McLennan county, Texas, on or about October 1st, 1894, by a combination of capital, skill, and acts to carry out restrictions in trade, to wit, in the sale of petroleum by increasing the price thereof to consumers in McLennan county; by agreeing among themselves that where they found competition they would bring their oils in and reduce the prices far below a profitable selling price, and by reason of their immense power, wealth, etc., to keep said prices at an unprofitable figure until competition was crushed and destroyed, after which they would raise the price far above true and honest market prices and exact an exorbitant, unreasonable figure from consumers and keep such prices fixed and established, and by said means they did so increase the price of petroleum oil. (R., pp. 5–6.)

The fourth count charges said parties, including Hawkins, with an unlawful combination and conspiracy on or about the
32 first day of October, 1894, in McLennan county, in then and there creating a trust by a combination of capital, etc., for the purpose and design to create and carry out restrictions in trade, to wit, in the manufacture, production, and sale of petroleum oil by preventing competition in the manufacture, production, and sale, etc., by agreeing that where they would find competition they would bring their oils into the various towns in McLennan county and reduce prices far below a profitable selling price, and by reason of their immense power, wealth, etc., keep said prices at such an unprofitable figure until competition was crushed and their weak competitors had fled the market, when they would raise the price far above the true and honest market price and exact exorbitant and unreasonable figures from consumers, and keep such prices fixed and established, and by means thereof did crush all competition. (R., pp. 6–7.)

The fifth count charged that the parties named, on or about the first day of October, 1894, did conspire and confederate and did create a trust by a combination of capital, etc., with the design and effect to create and carry out restrictions in trade, in fixing and establishing at a certain standard figure the price of petroleum oils, whereby such prices were controlled to the public, and by agreeing among themselves that where they found competition they would bring their oils into the various towns in McLennan county and reduce prices far below a profitable selling price, and by reason of their immense wealth, etc., keep said prices at such unprofitable figures until all competition was crushed and competitors fled the market, when they would raise the prices of their oils far above the

true and honest market price and exact an unreasonable figure from consumers for their oils, and keep such prices fixed and established, by means whereof such persons did keep fixed at a certain standard the prices of petroleum oils, etc. (R., pp. 7-8.)

The sixth count of said indictment charged the organization of the Standard Oil trust in New York on the 2nd day of January, 1892, between a great many corporations, partnerships, firms, and individuals who controlled and operated 95 per cent. of all the capital invested in petroleum oils and its products, in which Standard Oil agreement they bound themselves to organize a monopoly to control the oil trade in the United States; that the purpose of said trust, conspiracy, and combination *were* to organize
33 the Standard Oil trust for the purpose of manufacture, dealing, etc., in petroleum and its products, and for such other purposes as should be embraced in the several charters of the component companies and should seem expedient; that aside from the ostensible purposes such agreement was for the purposes of absorbing and monopolizing the petroleum-oil industry of the United States, and such combination was also for the purpose, first, for creating and carrying out restrictions in trade; second, of limiting production and increasing prices; third, for preventing competition and fixing at a certain standard figure the price of petroleum oil and its products; fourth, for the purpose of combining themselves with the object not to sell, dispose of, or transport petroleum oils below a certain standard figure; to keep the price of said products at a fixed and graduated figure, and to establish the price of petroleum and its products at such figures as to preclude the free and unrestricted competition, and for the purpose of combining their interests in the business. It was further alleged that each of the corporations, partnerships, firms, and individuals agreed to form Standard Oil Companies in certain of the States, which corporations were formed in pursuance of such agreement; that they further agreed to transfer and assign to the Standard Oil Company all the stock held by the participants in the individual companies, the trustees of the trust being authorized to issue trust certificates in exchange for such stock, such certificates amounting to many millions of dollars; that such agreement should be perpetual and it has existed ever since said date, and that the trustees of said oil trust are now engaged in carrying out the terms of the agreement, and have been since January 2, 1892, controlling and managing 95 per cent. of the capital invested in the petroleum industry in the United States; that the value of the certificates now in existence is about $200,000,000; that the trustees have divided the market for petroleum oils into subdivisions, allotting to each corporation, etc., a certain State or States in which to op-rate. This count further charges that the Waters-Pierce Oil Company, a corporation domiciled in the State of Missouri, has been allotted the market lying in the States of Missouri, Arkansas, Louisiana, and Texas, with the exclusive privilege of selling petroleum oil, etc., in said States, and that the other members of the Standard Oil trust

are bound by said agreement not to invade said territory
34 and sell therein; that the trustees of the Standard Oil trust and the officers of the Waters-Pierce Oil Company, in pursuance of the trust agreement and conspiracy, have subdivided Texas into four grand subdivisions in which to sell oil, and the Waters-Pierce Oil Company have an agent for every grand division and a local agent for the various towns and counties of Texas and in McLennan county, and these agents are acting under the control and management and direction of the trustees of the Standard Oil trust and the officers of the Waters-Pierce Oil Company and send daily reports of their sales of oil to said trustees and officers; that William E. Hawkins is the local agent of said trust in McLennan county, and, by agreement, is conspiring and confederating with the said trustees and officers and agents of the Waters-Pierce Oil Company in carrying out said conspiracy; that on or about October 1, 1894, in McLennan county, in pursuance of said designs and trust agreement and conspiracy, all the defendants, including John D. Rockefeller and others, did unlawfully agree, combine, etc., with themselves and with divers other persons in McLennan county, Texas, unknown in a conspiracy against trade, then and there creating a trust, by the combination of capital, skill, etc., with the design and purpose of carrying out restrictions in trade, to wit, in the manufacture, production, sale, etc., of oils, by keeping the price of oils at a certain rate per gallon, or at a certain price as otherwise sold, which price was far above the true market price, and with a view to preventing competition, reduce production, raise the price above the market value and cause the same to be purchased by actual consumers at a great price above the true market value, preventing competition, and fixing a certain standard figure in the price of petroleum oils, whereby such prices were raised and established and fixed in McLennan county at a fictitious value greatly in excess of the true market value; that the parties defendant did then and there unlawfully enter into a trust, combination, and conspiracy, and did conspire and confederate with each other, that they would not manufacture, produce, sell, etc., petroleum oils below a certain price in McLennan county, which price was above the true market value of said products, and did fix and keep the price in said county
at a certain figure, and, for the purpose of establishing the
35 price and to preclude and destroy free and unrestricted competition, the defendants agreed to pool their interests, so that the price of oil would be effected and fixed at a certain figure, and such prices were effected and fixed at a certain figure; free competition was destroyed in the following manner, to wit: All the defendants, in connection with divers other persons to the grand jurors unknown, would bring their oils into McLennan county, and when they found competition would immediately cut prices far below a profitable selling price and would not sell their oils to any dealer who did not agree not to purchase any competition oils, and, by reason of their immense power, wealth, etc., kept the price of oils at such unprofitable figures until all competition had been crushed and the competitors driven out of the market in McLennan county,

when they would raise the price of their oils far above the true and honest market price and exact unreasonable and exorbitant prices. (R., 8–14.)

The case was called for trial December 2, 1895, and the defendants who were arrested, to wit, Arthur M. Finley, William Grice, E. T. Hathaway, F. A. Austin, and W. E. Hawkins, severed, the other defendants not having been arrested, and E. T. Hathaway, the appellant, was placed on trial and announced ready, as did the State. (R., p. 19.)

After the announcement of ready for trial the defendant E. T. Hathaway filed and presented exceptions to the indictment, in substance, to wit:

1. Because it did not appear from the indictment that any offense against the law had been committed.

2. Because the indictment showed upon its face that the district court of the fifty-fourth judicial district had no jurisdiction.

3. Because the act of 1889, hereinbefore recited and upon which the prosecution was founded, was violative of both the Constitution of the United States and of the State of Texas, for the reason that said statute discriminated between different classes of persons and citizens of the State of Texas and of the United States, and denied certain persons and citizens the equal protection of the law, and proposed to deprive certain citizens of liberty, property, privileges, and immunities in a way other than by due course of the law of the land.

4. Because said act of March 30, 1889, was inoperative and void as to persons resident beyond the territorial limit of Texas.

36 5. Because said act did not prohibit a trust or declare it illegal, nor did it declare it an offense or propose to punish it, but merely defined a trust, without denouncing it, and was therefore not a penal law of the State of Texas and no prosecution could be maintained under it.

6. Because the indictment showed upon its face that the parties present were engaged in interstate commerce within the meaning of the Constitution and laws of the United States, and the district court of the fifty-fourth judicial district had no jurisdiction. (R., pp. 15–17.)

The court overruled these exceptions; to which the defendant excepted. (R., pp. 18.)

Thereafter the trial proceeded and continued until the 12th day of December, 1895, and the jury brought in their verdict, finding the defendant E. T. Hathaway guilty as charged in the indictment and assessing his punishment at a fine of fifty dollars, which verdict was received by the court and judgment duly entered thereon. (R., p. 19.)

On December 14, 1895, the defendant E. T. Hathaway filed his motion for a new trial, setting up fifty-four distinct grounds therefor (R., pp. 360–385). This motion was overruled by the court on December 16th, 1895, to which the defendant E. T. Hathaway excepted and gave notice of appeal. (R., p. 386.)

On December 14, 1895, the defendant also filed his motion in

arrest of judgment upon substantially the same grounds set up by his exceptions to the sufficiency of the indictment filed antecedent to the trial, with this additional ground, however, in substance, to wit, because the indictment was substantially defective in that it charged the defendant Hathaway with having violated the law of conspiracy against trade in carrying out, as principal, director, agent, or employé, the stipulations of the Standard Oil Trust agreement, but failed to charge that the defendant knowingly did this, when by the terms of the law no violation can be committed except the same be done knowingly, and that before defendant could be convicted it should have been alleged in the indictment that he acted knowingly; that the court in his charge submitted
37 such issue of knowledge to the jury, and that there was no allegation authorizing it, nor was there any proof thereof, and for this failure to charge in the terms of the statute the indictment was fatally defective. (R., pp. 386–389.)

The court overruled defendant's motion in arrest of judgment on December 16, 1895, to which the defendant in open court excepted. (R., p. 389.)

On December 16 the defendant was duly sentenced in accordance with the verdict and judgment, and was committed to the custody of the sheriff for confinement in the county jail (R., p. 391). The defendant having been granted ten days after adjournment of court in which to file statement of facts (R., p. 390), and having filed said statement within the time limited (R., pp. 20–222), prosecuted this appeal on fifty-three assignments of error, duly filed and incorporated in the record (R., pp. 392–416). These will be discussed in their order, grouping such assignments of error as may be germane to the particular assignments.

I.

Appellant's first and second assignments of error are as follows:

1. The court erred in overruling the exceptions of the defendant in the indictment in this cause.

2. The court erred in overruling defendant's motion in arrest of judgment for the reasons therein set out. (R., p. 392.)

As the grounds of exceptions filed and overruled by the court are similar to those presented in appellant's motion in arrest of judgment, the two will be treated together, in so far as this identity extends. The defendant E. T. Hathaway excepted to the sufficiency of the indictment upon the following grounds:

1. Because it does not appear upon the face of the indictment that an offense against the law was committed by this defendant.

2. Because said indictment shows upon its face that the district court of the fifty-fourth judicial district of the State of Texas has no jurisdiction thereof.

3. Because the act of the legislature of the State of Texas
38 entitled "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, and published

in the General Laws of the State of Texas for the year 1889 as chapter 117, and which statute is the basis of the prosecution against this defendant in these cases, is violative of both the Constitution of the United States and the State of Texas, in this, to wit:

That said statute discriminates between different classes of persons and citizens of the State of Texas and of the United States, and denies to certain persons and citizens the equal protection of the law, for that said statute authorizes the punishment of certain citizens and classes for acts and omissions, while it expressly authorizes many other classes and citizens to do and perform said acts made penal as aforesaid. Said act is void because in conflict with the constitution of the State of Texas and the bill of rights therein, which declares "All men shall have equal rights, and that no man or set of men is entitled to exclusive public emoluments of privileges but in consideration of public services," and that "No citizen shall be deprived of life, liberty, property privileges or immunities or in any manner disfranchise-, except by due course of the law of the land."

Said act is void because in conflict with the Constitution of the United States, which declares that "No State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," because, while pretending to embrace within its purview all classes and conditions of men, in order to prevent combinations by which the costs of the necessaries and comforts of life to the people might be increased, it is, by the express exemption of producers and raisers of agricultural products and live stock contained in the 13th section thereof, limited in its application to a comparatively small portion of the people, who are thereby subjected to pains and penalties not inflicted upon the great majority of people under similar circumstances and conditions.

39 4. Because said act of March 30, 1889, is inoperative and void as to persons resident beyond the territorial limits of the State of Texas, and who have not and never have been personally present in the State of Texas nor done any act within the State of Texas which could subject them to the penalties prescribed.

Said act is void and of no effect in so far as it denounces the penalty against any person, firm, or corporation by reason of any acts or dealings of interstate commerce within the meaning of the law, the said State of Texas, in all of its departments, being wholly without jurisdiction in such cases.

5. Because said act of March 30, 1889, does not prohibit a trust or declare it illegal, neither does it declare it an offense or propose to punish it, but merely defines a trust without denouncing it, and is therefore not a law and never was a penal law in the State of Texas, and no suit or prosecution can be maintained under it.

6. Because said indictment shows upon its face that the parties charged therein have manufactured, shipped, and transported oil, if at all, from some other State into the State of Texas and there sold the same, and that such acts constitute interstate commerce

within the meaning and intention of the Constitution of the United States and the laws of Congress passed in pursuance thereof, and this court has no jurisdiction of any such acts by indictment or otherwise.

The court will perceive from a reading of these exceptions that there are three distinct grounds relied upon by the appellant for invoking the judgment of the court as to the nullity of the prosecution. These grounds may be grouped and stated together as follows:

1. The act of March 30, 1889, is repugnant both to the constitution of the State of Texas and the Constitution of the United States, for the reasons stated in said exceptions.

2. If said act of March 30, 1889, is not violative of the Constitution, State and Federal, it is invalid and inoperative as a penal enactment by reason of its failure to prohibit trusts or to declare them illegal, and because of the further failure of said acts to declare any offense or propose any punishment for it.

3. Said act is further inoperative and void as to persons resident beyond the territorial limits of the State of Texas, and especially as to those persons who are engaged in interstate commerce, and as to these classes of persons, the Congress of the United States having covered the field attempted by the act in question, locally, in the passage of the conspiracy act of 1890, the State is without jurisdiction, either executive, legislative, or judicial, to punish offenses coming within the denunciation of the act of Congress aforesaid.

And as a matter of constitutional construction it is indifferent whether Congress had passed any act or not, the jurisdiction vested by the Constitution of the United States in matters of interstate commerce being exclusive in the Federal Government.

The constitutionality of the act of March 30, 1889, it is insisted for appellant, is still an open question, especially in this court. We say this with perfect respect for the intimations contained in the opinion of the Supreme Court decided in the case of Anheuser Busch Company *vs.* Houck, 30 S. W. Rep., 869. We say "intimation," because the question of constitutionality of the act of March 30, 1889, was not raised in that case and was not before the court; neither was it raised in the case while pending on appeal in the court of civil appeals for the fourth supreme judicial district, and the opinion of the court of civil appeals for that district was equally gratuitous, as this court will find upon an inspection of that opinion. (See Anheuser Busch *v.* Houck, 27 S. W. Rep., 692.) We are also not unmindful of the learned discussion of the chief justice of the supreme court as delivered in the case of The Queen Insurance Company *vs.* The State, 86 Tex., 267–'8. In the Anheuser Busch case, *sup.*, the court of civil appeals in an opinion delivered by Chief Justice James used this language:

"The constitutionality of the act of 1889 is not raised in the brief and we perceive no objection to it in that respect. The question was raised in the case of Insurance Company *vs.* The State (Tex. Sup., 24 S. W. Rep., 397), but was found not necessary for its de-

cision. The objection there pointed out, which seems to be
41 the only one to suggest itself, is the clause exempting from its provisions all agricultural products and live stock while in the hands of the producer. This is said to make the act class legislation. It is apparent that all persons of every class upon whom the act professes to operate are treated without distinction. This feature of a general statute is held to be the test of whether it is or not obnoxious to that objection, and we believe the act to be valid. Railway Company *v.* Mackey, 127 U. S., 205, etc."

An examination of the authorities cited by the court of civil appeals, and especially the Mackey case, 127 U. S., 205, reveals the fact that such decision does not support the court in its opinion. That was a Kansas case, involving the validity of the fellow-servant act as applied to railroads, and the reasoning of the Supreme Court of the United States, as well as its decisions, cannot be perverted so as to afford a proper support to the text of the opinion of the court of civil appeals. The Supreme Court, in passing upon the same case on writ of error, used this language:

"For the reasons given by the court of civil appeals, we also agree with them in holding that the act is not in violation of the Constitution." (S. W. Rep., 870.)

So we repeat again that there is no authoritative decision in this State upon the question duly raised and presented, holding that the act of March 30, 1889, is constitutional; and while the intimations of the court of civil appeals for the fourt-supreme judicial district and of the Supreme Court are entitled to respect, yet they are clearly made without argument or consideration and in a case in which the question was not presented by counsel. We therefore submit with confidence this proposition:

The act of March 30, 1889, is violative of both the Constitution of the United States and the constitution of the State of Texas in that it is class legislation, discriminates against citizens, and denies to citizens the equeal protection of the laws.

The gist of the decision in Railway Company *vs.* Mackey,
42 127 U. S., 209, may be stated in the exact language of that court, as follows:

"When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions."

The legislation in question does not apply to particular bodies or associations. It does not impose upon them additional liabilities. Such legislation, we submit, will contravene the organic law relating to the equality of citizens, even had it exempted from its operation farmers and stock-raisers. But this is not the exemption prescribed. The law goes much further than this and exempts particular classes of farmers and particular classes of stock-raisers. Its language is, "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." (Sec. 13.) A reading of this section clearly manifests

that there may readily occur instances in which some farmers and some stock-raisers may become liable to the penalties prescribed, if, indeed, there are any penalties prescribed, in this act for conspiring and combining together to raise or lower prices, restrict trade, or monopolize the markets. Under a proper construction of this exemption it would seem that farmers and stock-raisers are not exempted from the denunciations of the statute, if it contains any denunciations, except as to the agricultural products and live stock in the hands of the original producer or raiser. A farmer may be prosecuted, if the law is valid, if he combines with his neighbors to raise, lower, or affect prices of wheat, corn, hay, oats, butter, chickens, eggs, or poultry which he may have procured by purchase or exchange from his neighbor farmer, while free to make these combinations with reference to such products as he may have raised himself. What better right does a farmer have over the products he raises than over those he may have purchased? His ownership and right of property is the same in both instances, and yet under this law he may combine and confederate to fix prices and
43 monopolize markets as to such products as he may have raised or produced, and yet become a felon under the law if he undertakes to do identically similar acts with reference to other agricultural products which he may have obtained by exchange with his neighbor.

And the inequality of the law becomes perfectly apparent when we consider that a farmer in possession of corn, wheat, and oats that he has raised can combine and fix prices as to such commodities and at the same time his neighbor, who may be the owner of similar commodities which he may have bought or traded for, is prohibited, under heavy penalties, from doing the same identical act, or, to carry the illustration further, the land-owner, who may be a farmer himself and yet cultivate his farm exclusively by tenants, who pay him rent, is not permitted to combine and fix prices and control, or attempt to control, markets as to the agricultural products he may have received for the rent of his farm, for in that event he would not be the original producer within the meaning of the law, and yet the tenants upon said farm, who are the original producers, may combine to any extent they deem proper for these identical purposes without fear of punishment.

Or, to state another illustration of the construction and effect of the act under discussion, the large farmer, who owns thousands of acres of land and yet cultivates the same by hired labor exclusively, is an original producer under the statute and can combine to any extent he pleases with any person, firm, or corporation he pleases for the purpose of fixing prices and monopolizing the market, and yet his humble neighbors, who may perhaps live on their farms and yet rent them out to tenants, is not permitted to make like combinations, because in this instance the tenants are the original producers and his ownership of the agricultural products is derived by collection of rent in kind.

The same confusion and contradiction occurs when we consider the effect of the statute in the matter of live stock in the hands of

the raiser. The owners of ranches comprising thousands of acres as well as thousands of head of cattle, horses, sheep, etc., are authorized and encouraged by the statute to make all sorts and
44 kinds of combinations, regardless of their effect upon the interest of the general public, and are, you might say, by the terms of the statute expressly authorized to combine to fix prices, to restrict trade in articles of prime necessity, and to monopolize the markets, but the dealer in live stock, the purchaser from these cattle kings, the men who furnish him a market for his products and who as a class are not possessed of any wealth usually, are denounced as felons if they in like manner, even for self-protection, combine with one of their fellows in attempting to fix prices or to protect themselves from the rapacity of original producers.

These illustrations demonstrate very clearly that the real reason alleged by the courts, and especially by the Supreme Court in the Mackey case, *sup.*, cannot apply to the act in question. As said before, this act does not apply to particular bodies or associations. It does not apply to any class as a class. Even the particular classes apparently embraced within the purview of the ststutory exemption are susceptible of division, and a portion of a class is entitled to claim immunity, while other portions of the same class, deriving their livelihood in the same manner and by the same methods, come within its denunciation. Some farmers are exempt as original producers, while other farmers are punished. Some stock-raisers are exempt from penalties, while other stock-raisers who have bought or traded for their cattle or taken cattle, horses, or other stock in payment for debt *or* not.

Carrying the line of argument further and leaving out of view altogether this discrimination between citizens of the same class, which discrimination the acts in question evidently embraces, and turning to the body of the people proposed to be affected by the act, we find, employing the language of the Supreme Court of the United States in the Mackey case, that additional liabilities are not applied to the particular bodies or associations, but that citizens who are subjected to penalties of the act comprise no particular class.

This is not a case where certain duties are devolved upon all railroads, as in that case, but here the legislature of Texas has
45 seen fit, in its wisdom (if the act is a penal enactment), to denounce a general penalty of felony, accompanied with imprisonment in the penitentiary and fine, as punishment against the whole body of the people for any violations of the terms of the act; but before concluding the enactment, which was evidently designed and intended to protect the people of Texas in their procurement of the necessaries of life, the same legislature, incited by some motive, which need not be discussed, has seen fit to exempt or attempt to exempt from the operations of the statute the principal ingredients which enter into the necessaries of life and to have the penalty for a violation of the law applicable to only a small part of the citizenship of the State.

Agricultural products in its proper and general sense includes

corn, wheat, and other grain upon which the people rely for bread. The term also includes the wool and cotton upon which the people must rely for their necessary clothing. The term live stock includes every species of animal subject to use as food by man. So in the matter of food and raiment the legislature has extended encouragement to monopoly in a bill having for its object the promotion of free competition in the State of Texas and the cheapening of the necessaries of life.

The exemption of these products in the hands of the original producer and raiser exempts, upon a rough estimate, four-fifths of the people of Texas from the operations of the act because four-fifths of the people of Texas are engaged in the business of producing and raising agricultural products and live stock.

The penalties are visited upon the remaining one-fifth of the people of Texas without regard to any particular class. This one-fifth comprises all classes and conditions not heretofore exempted, and this in the face of the constitutional guaranties, State and Federal, of perfect equality of the citizens before the law. Even in the matter of labor the iniquitous character of the enactment under discussion is apparent. This statute makes no exemption of labor or of the products of labor. Under its terms and provisions the laborer is subjected to punishment for doing the very act that the landowner or farmer is authorized to do. The original producer, if a farmer, has authority to combine to fix prices, restrict trade,
46 build up monopoly, while original producers in other lines of labor are denounced. The agricultural products of the farmer are the fruits of his labor, but no more so than the manufactured articles of the working man are the fruits of his labor. The blacksmith, the carpenter, and all other similar artisans purchase their raw material, and the manufactured product constitutes the fruits of his labor and upon which he must rely for the sustenance of himself and family, just as the agricultural products of the farmer constitute the fruits of his labor and upon which he relies for similar purposes; yet the statute prescribed total inequality between these classes and encourages the one to build up monopolies, while denouncing the others if they make any attempt in the same direction, or, to apply the provisions of the statute to the matter of live stock, from which application this inequality becomes still more apparent, the cattle king may raise his thousands of head of live stock each year, and so long as this stock remains in his hands he can combine not only with his neighbors, but with all other similar original producers throughout the State of Texas, or even throughout the United States, for the purpose of fixing prices and monopolizing markets. Not so, however, with the hands which he employs and which constitutes the ordinary labor of the ranch. The fruits of the labor of the latter class are his day's work. This may be paid him either in money, which he invests in stock, or it may be paid him in stock on shares or otherwise, and yet, not being the original producers, he is forbidden to make any combination of any character whereby the prices of the fruits of his labor can be promoted or regulated in any manner whatsoever. These common

laborers on the ranch can form no agreement among themselves whereby they can maintain the prices of their labor, and yet the ranch-owner can combine with other ranch-owners with reference to the prices of their products, which constitute the fruits of their labor. The demonstration can be carried to a further absurdity by simply calling attention to the fact that under the terms of the statute the farmer or stock-raiser may combine with any person, firm, or corporation whomsoever or any number of them in respect to agricultural products he has produced or the live stock he has raised without fear of punishment under the law, and yet the party or parties with whom he makes such combinations may be
47 held liable to all the penalties denounced against such combinations. Two citizens may combine, therefore, for the purpose of fixing prices, one by doing so committing a crime and the other by so doing performing a laudable act. If this is equality before the law within the meaning of the Constitution, we had better revise the Constitution.

The court will bear in mind that the body of the citizenship, upon whom the penalties of this statute fall, do not constitute a class whose business implies a trust or public duty. It extends to and affects matters of private business almost exclusively. The condition of the laws, including this enactment under discussion and the railroad commission act of 1891, demonstrate that in so far as railway corporations are concerned this act of 1889 is mere *brutem fulmen*. It is true this act of March 30, 1889, commonly known as the "anti-trust law," does prescribe that corporations shall not combine to raise prices for transportation, and the theory upon which it rests is that there shall be at all times free and active competition in the matter of transportation within the State of Texas. This theory, however, was overturned altogether by the passage of the railway commission act of 1891, which, in effect, forbids competition between railway lines; and the State, by the terms of the commission act and of the constitutional amendment authorizing its enactment, assumed the duty and is now exercising it of fixing rates for transportation of all commodities at a fixed and standard price, and denounces with very heavy penalties any railway company which may offer to compete in the matter of prices for transportation. If the anti-trust act of 1889, under discussion, applied only to those occupations where the business implies a trust or public duty, such as railways, telegraphs, telephones, etc., then the argument might be plausible that it was not class legislation. But such is not the case here at bar. The penalties are visited, not upon those exercising a trust or public duty, but upon the body of private citizenship, composed of artisans, mechanics, professional men, merchants, traders, and the like, giving advantages to certain persons that it not only withholds from others, but denounces in others. As said by Judge Simpkins, in delivering the opinion of this court in the case involving this question:

"In those occupations where the business implies a trust
48 or public duty the Government has the power to see that the trust is not abused and the duty is properly performed. On

this principle statutes have been upheld which regulate the charges of railway companies, elevator, telephone, telegraph, and other companies, hackmen, warehousemen, mills, etc., but we are aware of no well-considered case on which a statute has been upheld that undertook to regulate the dealings between employer and employé." (S. A. & A. P. R'y Co. *vs.* Wilson, 19 S. W. Rep., 913.)

In a case involving the right of the legislature to single out a class and prohibit such class from carrying on business on Sundays the supreme court of Tennessee, in holding such act unconstitutional, used this language:

"This act, if operative, is for the benefit of all individuals (barbers excepted) who may see fit to keep and use bath-rooms for profit. We know that all the best hotels have bath-rooms for the use of guests; that they receive pay for baths and permit them on Sunday; that in many cases a barber has his shop and bath-rooms under the roof and in parts of the building in which the hotel and bath-rooms are kept, occupied, and used. So, if the act is to be enforced as the law, it will apply alone to barbers, with its penalties and punishments, while the innkeeper may with impunity use and keep open his bath-rooms in the same floor and equally public. Under the act every other individual than one engaged in barbering may establish and keep open on Sunday any number of bath-rooms, and may even buy or rent those now used by the proscribed barber, in or out of the hotel building, continue its use as a bath-room, and keep it open on Sunday. The act falls strictly within the ordinance in its tacit but distinct and unequivocal reservation of rights, privileges, immunities, and exemptions to all classes of individuals except those engaged in the business of barbering, and upon this as well as upon the first ground it is void." Ragio *vs.* State, 6 S. W. Rep., 401.

As said by our supreme court, quoting from 2nd Yerg., 602, in discussing the term "law of the land:"

"They are now in their most usual acceptation regarded as general public laws binding all the members of a community under similar circumstances, and not partial or private laws affecting
49 the rights of private individuals or classes of individuals." Janes *vs.* Reynolds, 2 Tex., 252.

Judge Catron, in delivering the opinion of the supreme court of Tennessee, in an early case, used this language with reference to the matter under discussion:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the most of the community and those who made the law by another; whereas a like general law affecting the whole community equally could not have been passed." Wally *vs.* Kennedy, 2 Yerg., 555.

The same judge, in passing upon the question in another case, has used this language:

"The right of life, liberty, and property of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. * * * The idea of a people, through their representatives, making laws whereby are swept away the life, liberty, and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom had a name. Such abuses resulted in the adoption of Magna Charta in England, securing to establish against odious exceptions, which is and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of a citizen against legislative usurpation was the reason of its adoption as a part of our Constitution." Vanzant *vs.* Waddel, 2 Yerg., 270–'1.

The supreme court of Illinois, in passing upon the question whether it was competent for the legislature to single out owners and operators of coal mines as a distinct class, and to provide that they should bear burdens not imposed on other owners of property or employers of laborers, and to prohibit them from making contracts which it was competent for other owners to make, used this language:

"It is declared in section 2, art 2, of our Constitution that no person shall be deprived of life, liberty, or property without due process of law, and section 13 of the same article provides that private property shall not be taken or damaged for public use without just compensation. But the words 'due process of law' in this connection are held to be synonymous with the words 'the law of the land.' Cooley's Const. Lim. (1 ed.), pp. 352, 353. And this means general public law, binding upon all members of a community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals. * * * Every one, says Cooley, has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government."

Mr. Locke has said of those who make the laws: "They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough, and this may justly be said to have become a maxim in the law by which may be tested the authority and binding powers of legitimate enactments." The same authority says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges, or legal capacities

in manner before unknown to the law, could be sustained. Distinctions in these respects should be based upon some reason which renders them important, like the want of capacity in infants and insane persons; but if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was per-
51 missible to others, that it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." Minnock *vs.* The People, 7 N. E. Rep., 631; S. C., same case, 117 Ill., 294.

The same author (Cooley), in discussing the question as to the law of the land, uses this language:

"On the other hand, we shall find the general rules may sometimes be as obnoxious as special if they operate to deprive the individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied to the controversies of his neighbors, the whole community is also entitled at all times to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land." Cooley Const. Lim., 355.

This court, in the case of The S. A. & A. P. R'y Co. *vs.* Wilson, *supra*, has said:

"The doctrine is often stated that a statute is general and uniform in its operation and not subject to the objection of being class legislation when it affects equally all who are brought within the relations and circumstances provided for, though it may not operate on every citizen, but it by no means follows that the legislature have the right to impose any burden by simply placing it on all the individuals of a certain class. It must rest upon some reason upon which it could be defended. Unquestionably the legislature may subject any occupation, business, or class to reasonable regulations when required by public interest and welfare, but in all illustrations of the exercise of this power it will be found there was some circumstance of threatened damage to the public that required the regulation."

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52 In the case of the Railway Co. *vs.* Baty, 6 Neb., 37, the court said "The 'law of the land' does not mean legislative act. If it did, every restriction upon legislative authority would at once be abrogated; for what more can a citizen suffer than to be

taken, imprisoned, disseized of his freehold, liberty, and privileges, be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, his life, without crime? Yet all that he may suffer if an act of the legislature simply denouncing these penalties upon particular persons or a particular class of persons be in itself the law of the land, in the sense of the Constitution."

The circuit court of the United States for the district of Kansas, in passing upon this question, used this language:

"If it (due process of law) has no broader meaning than process prescribed by act of the legislature, it is the end of the case; but such a construction will render the constitutional guaranty sheer nonsense, for it would then mean no State should deprive a person of life, liberty, or property unless the State shall choose to do so. It has repeatedly and uniformly been adjudicated that the terms 'due process of law' and 'law of the land' have a broad and comprehensive meaning and originated in that great bill of rights, Magna Charta, and operated as a restriction on each branch of civil government." Murray's Lessee *et al. vs.* Hobokon Land & Improvement Co., 18 How., 272; Davidson *v.* New Orleans, 96 U. S., 107; *Ex parte* Virginia, 100 U. S., 346.

In the last-cited case the court, speaking of these words in the citation, says:

"They have reference to the actions of a political body denominated a State, by whatever instrument or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provisions, therefore, must mean that no other agency of a State or of the officers or agents by whom its powers are executed shall deny to any person within its jurisdiction the equal protection of the law. Whoever, by virtue of a public position under a State government, deprives another of property, life, or liberty without due process of law violates the constitutional inhibition, and, as he acts in the name of and for the State and is clothed with the State's power, his act is that of the State.
53 This must be so or the constitutional provision has no meaning." *In re* Ziebold, 23 Federal Rep., 791.

Perhaps the clearest exposition of the right of the citizen to equality under the law is laid down by Mr. Justice Field in the case of County of San Mateo *vs.* Southern Pacific R'y Co., in which this learned jurist said:

"The fourteenth amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property. * * * Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws; and by 'equal protection of the laws' is meant equal security under them to every one, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property,

the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances." 13 Fed. Rep., 733.

We do not deem it necessary to pursue these quotations further. Sufficient has been adduced to establish the proposition that equality before the law is a fundamental principle of English and American liberty, which not only has been consecrated in all the latter-day constitutions, State and Federal, but that the principle has been guarded by the courts with a jealous and watchful care at all times, so that the citizen may have guaranteed to him this inestimable privilege and condition. We cite the court to other cases as follows which substantiate and illustrate the doctrine:

Hewitt *v.* The State, 25 Tex., 722.
Loan Association *v.* Topeka, 20 Wall., 655.
Holder *v.* James, 11 Mass., 396.
Lewis *v.* Webb, 3 Me., 320.
Simons *v.* Webb, 103 Mass., 572.
54 Baggs' appeal, 43 Pa. St., 512.
Durke *v.* City of Janesville, 28 Wis., 464.
People *v.* Hurlburt, 24 Mich., 44.
The State *v.* Goodwell, 10 S. E. Rep., 285.
The State *v.* Coal & Coke Co., 10 S. E. Rep., 288.
Goodcharles *v.* Wiggeman, 113 Pa. St., 354.
Wilder *v.* R'y, 38 N. E. Rep., 289.
People *v.* Common Council, 38 N. W. Rep., 470.
Chair Co. *v.* Reynolds, 43 N. W. Rep., 1006.
City of Janesville *v.* Carpenter, 77 Wis.
Gordon *v.* Building Association, 12 Bush., 110.
City of Shreveport *v.* Levy, 26 La. Ann., 671.
Ex parte Westerfield, 55 Cal., 550.
Clark *v.* Free Press, 72 Mich., 560.
Pierce *v.* City of Portland, 69 Me., 278.
R'y *v.* Morris, 65 Ala., 193.
R'y *v.* Morse, 60 Miss., 641.
Barbier *v.* Connoly, 113 U. S., 27.
Yick Wo *v.* Hopkins, 118 U. S., 356.
Dent *v.* West Virginia, 129 U. S., 114.
Virginia *v.* Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Strauder *v.* West Virginia, 100 U. S., 303.
State *v.* Loomis *et al.*, 22 S. W. Rep., 350.

As said by the S-preme Court, in an unanimous opinion, in speaking of due process of law and the equality of citizens:

"The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." Dent *v.* West Virginia, 129 U. S., 124.

And as said by Mr. Justice Matthews in Yick Wo. *v.* Hopkins, *sup.*: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed

to rest, and review the history of their development, we are constrained to conclude that they do not mean — leave room for the play and action of purely personal and arbitrary power."

55 The language of the Supreme Court of the United States in Barber *v.* Conoly seems to be so apposite that we may be pardoned for concluding our citation of authorities with this quotation from that opinion:

"These provisions are undoubtedly intended that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." 113 U. S., 27.

We conclude this branch of the argument in support of the proposition made at the outset, that this legislation does not come within any of the exceptions recognized by the judicial decisions of America. We do not mean to say by this that the State of Texas does not have power to prescribe regulations to promote the health, peace, morals, education, and good order of its people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation, sometimes of a special character, having these objects in view must obtain in certain districts, and special burdens are sometimes necessary for general benefits, such as for supplying water, preventing fires, lighting district-, clearing streets, opening parks, and many other objects. As said by the courts, occasions for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though in many respects necessarily special in their character, these in proper limitations do not furnish just

56 ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. The court will readily understand the distinction we are attempting to draw. This statute under discussion is clearly class legislation, discriminating against some and favoring others. It is not that character of legislation which, in carrying out a public purpose, is limited in its applications, and within the sphere of its operation affects alike all persons similarly situated. As we have shown hitherto, it may affect and does affect individuals of the same class in an opposite way—it favors some individuals of a certain class and

denounces other individuals of the same class. Perhaps the law would be less subject to criticism if it had exempted farmers and stock-raisers, constituting them a particular class necessary to be specially favored in the legislation of the State; but the law does not do this, and this is the extent to which any case has as yet gone, to wit, that the State, in the exercise sometimes of its police power, may exempt certain classes from the operation of a general law, and such exemption has been held valid. This statute exempts no class. To the contrary, it seeks to exempt certain classes of property, which is carrying the doctrine beyond any case to which we have had access. All property in the State is entitled to equal protection, and no special property is entitled or ought to receive any special favors. Discrimination may be as potent against the citizen in the direction of his property as if aimed directly against him personally. The right to hold or sell property and to make agreements and contracts concerning it which may be beli-ved by the owner to be for his betterment is the most essential right of property. With some citizens this right is taken away; with others it is encouraged.

For a year past the farmers of Texas and of the South have been engaged in the business of combining together to create or carry out restrictions in trade, and to limit and reduce the production of cotton for the purpose of increasing the price thereof, and also for the purpose of fixing the price at some standard or figure. To accomplish these objects they have made and entered into contracts, obligations, and agreements of various kinds and descriptions by which they have bound themselves to keep the price of cot-
57 ton as high as possible, and have settled or endeavored to settle among themselves to prevent a free and unrestricted competition among themselves or others in the sale of cotton. Their proceedings have been open and notorious and have been regarded favorably by people and State authorities, including prosecuting and executive officers, as commendable; and yet under this statute of 1889 the laborer who picks this cotton or the merchant who advances the money to enable it to be produced or the de*la*er who buys it in open market is forbidden to take any such steps in any manner directly or indirectly calculated to protect his interests as to the price of the commodity or to prevent impositions upon themselves in its purchase and sale. These combinations among farmers, strictly speaking, are not with reference to agricultural products in the hands of the original producers, because in its nature such action is anticipatory before the crop is pitched. The organization is perpetuating itself; it issues circulars broadcast all over the country stating its purposes and designs and advising the steps necessary to secure its objects long before the crop is pitched. Possibly under the terms of this statute their action does not contravene the law. We do not insist that it does, but what we do insist upon is that it furnishes a remarkable instance of absolute inequality before the law of the citizens of this State, in total disregard of the limitations and requirements of our constitutions, State and Federal.

* * * * * * *

We submit this remarkable record of a remarkable trial to this court without further comment or argument.

Many gross errors have not been referred to in this brief, but are apparent in the record. Counsel for appellant asks the court, in the interest of the criminal jurisprudence of this State, for a careful examination of the record in all its features and an exposition of the law which shall govern similar trials in future in our State. The judgment of conviction herein is invalid for scores of reasons, and counsel have no apprehension as to the result of this appeal. The need of the hour, however, is the re-establishment by this court of some of the essential landmarks of criminal jurisprudence applicable to this trial. We ask the judgment of the court upon
58 the essential and important assignments made herein, including the constitutionality and validity of the act of 1889 as well as the law governing interstate commerce. The people of Texas are at sea as to this class of legislation, and it is time the law should be expounded so that the citizen may know the rules which should govern him in the conduct of his every-day business. Immense property interests are at stake, and, in addition to that, the liberty of a citizen of Texas has been invaded wrongfully and illegally and he is now behind the bars of the common jail of McLennan county awaiting the result of this appeal. Conscious of his innocence, he submits his case and begs of this court his ample vindication from the record; and if by means of his vicarious atonement the laws of the State may be hereafter administered in consonance with truth, justice, and the Constitution he will be entirely satisfied.

C. P. & J. D. JOHNSON,
CLARK & BOLINGER,
Counsel for Appellant, E. T. Hathaway.

59 *Speech of Mr. Taylor, County Attorney, in His Opening Argument to the Jury.*

(As revised by the author.)

GENTLEMEN OF THE JURY: We have been engaged since last Monday a week in the development of a state of facts that have been gathered from all parts of Texas with a view of bringing them before this court upon an indictment filed by a grand jury in your county against persons named therein, alleging a violation of what is known as the "Texas anti-trust law." Trusts, gentlemen of the jury, in the sense in which they are now used in this case is a modern term. The fathers of this Republic knew nothing of them; they have been brought forth, formulated, discovered, created, invented, if I may use the term, in modern times; they are enabled to grow in this country and prosper and grow rich and laud it over the people of this country because the courts of the country have not had legislation formulated to meet them and to crush them; and, gentlemen of the jury, the officers of this country may burn midnight oil; they may ransack every neighborhood and every com-

munity in Texas; they may labor day in and day out for the purpose of procuring testimony and placing it before the jury, but the final action, in order to furnish the remedy and relieve the people, is in the jury-box itself.

Now, I suppose, gentlemen, you are pretty well posted as to what it takes to constitute a trust, because we have been describing it to you through the mouths of witnesses for a solid week, a state of facts that have shown with as much conclusiveness as any state of facts could possibly show that Texas is under an awful trust—that Texas is being dominated from one end of the State to another by as absolute and potential and powerful and effective and complete a combination as was ever invented by civilized man. Why, the law, gentlemen of the jury, that is written upon that statute book, and the amendment thereto, passed during the last legislature, which is about this one repeated, very little difference, the amendment having been made in order to reach insurance companies as well as dealers in commodities. That law was passed by the legislature of Texas for the purpose of enabling the authorities in this country to free the
60 people from the Standard Oil trust; and while the legislature of Texas, itself the law-making power of this State, realized and knew, understood and felt the power of this monstrous organization that was resting upon it, still when they come to draw the line in this court and try them, they set back upon their dignity; they write letters from their offices in the centres of power and wealth and civilization and they tell us, "We will sit here silent, holding within our vaults the evidence of our guilt or innocence, but we will not use it. We will sit here in the forums of the State of Texas in silence and say that we are not guilty, and that we are not members of any trust, and that we are merely innocent people being persecuted by the authorities, and we will get up before the juries and appeal to them that the case is not proven, and upon that ground we will ask them for a verdict of not guilty." Gentlemen, have you ever read the testimony of members of this combination taken before the various tribunals of the United States? If you have, you have found this, that the people who are organizing these gigantic schemes, that the people who have been able to squeeze out of the masses of the United States their millions, that the people who have been able, by their secret combinations, to pile up millions and millions of dollars in their own coffers, when they get before the authorities are the most ignorant creatures on earth. If I had an idiot boy that didn't know as much as some of these fellows don't know before congressional committees of the United States, I would take him out behind the house and kill him. They don't know anything; they are absolutely without any mental capacity to understand or to know anything when you ask them anything about their business. I reckon they draw a distinction between "knowledge" and "actual knowledge." I reckon they had been trained so that they can split hairs upon knowledge and actual knowledge. But there is one thing about them—that is, you can't get them to know anything. They have not got either any mental capacity or else they have forgotten everything they

ever did know, or something is the matter with them; something wrong. Knowing that fact, gentlemen of the jury, knowing that they wouldn't know anything, and they wouldn't even come here to Texas to tell what they did know—knowing that they didn't know anything, the legislature says that whenever one of these things
61 called a trust is formed, everybody who is carrying out its mandates, either as employés or agents, who are carrying out its mandates in this country, are original conspirators and should be punished as such. If you expect to get rid of them, you have got to find those guilty whom we can bring here and prosecute. You have got to start on them, and maybe, gentlemen of the jury, in the course of time, when honest men get into office, who will honor the executive warrants of Texas when they are sent to other States for the rich man as well as the poor man, if we ever get men in office in New York and in Missouri and in Florida who don't belong, body and soul, to the corporation- and combinations and trusts and who will honor the executive warrant that is sent from Texas—when we get men of that sort in office, we will have the original conspirators here and try them. But the power of money, gentlemen—why, gentlemen, the power of God has sunk into absolute insignificance in this country when compared to the power of Rockefeller. Talk about bringing to Texas to try him, the Flaglers, the Rockefellers, and the Pierces, and those fellows! Why, you can't get them out of their States. You can get a fellow who forges a note for $25.00 on the First National bank, a check, and — he goes to New York Mr. Culberson can get —. All he has got to do is to grant a requisition and send a copy of the indictment to New York, and Mr. Morton, the governor of that State, and Mr. Flower, the previous governor of that State, will execute his executive warrant and it will be served on a fellow that forges a note for $25.00 or that steals a $15.00 yearling, but when the great State of Texas formulates an indictment here in Texas against Rockefeller and a copy of that bill is sent to New York, one of the attorneys for that oil trust trots out on the street and laughs in his sleeve and says, "Ah! Some of that Southern socialistic legislation that we pay no attention to in New York." And Mr. Flower and Mr. Morton agree with him. "Socialistic legislation that is now prevailing in the Southern States." That's all the answer you will get. When they have formed a conspiracy here and are robbing the people of Texas each year out of two or three or four millions of dollars of hard-earned money and when the people's representatives pass a law and enact a law in this country for the purpose of
bringing these fellows here and saying that you shan't run
62 such a business here in this country, they are met with a flippant statement by some lawyer in New York that "it is socialistic legislation, and that therefore we will not pay any attention to it, and we will see that the governor of the State, who is our minion and tool, does the same thing." That being the case, gentlemen, how are you to reach them? You have got to reach them just as this law reaches them, by stating to them that we will penitentiary every man you send here to execute your decree, be-

cause the man who executes the decrees of a trust, I don't care whether he does it for a salary or not, is just as guilty as the man that forms it and pockets its proceeds, and if you gentlemen expect us to stop this thing and open the markets of this country to free competition you have got to send the people to the penitentiary who are executing the mandates of the trust.

Judge CLARK: We except to that line of argument. Note our exceptions.

Mr. TAYLOR: Isn't that so? That's the way they do all over the United States. They except to the truth; they file a bill of exceptions to the truth.

Judge CLARK: I have got a right to except when I think the laws have been violated, and I do it in a professional manner, and I do not propose to be commented on when I am following the law.

Mr. TAYLOR: You see, gentlemen of the jury, that when you commence to get next to them they begin to flinch.

Judge CLARK: I note another exception to that remark of counsel in his argument. I take another bill on that.

I stated, gentlemen, and I reiterated, that if the juries of this country—who were charged with the execution of this law, who are empannelled and sworn, and who represent the suffering people of Texas in this jury-box against this most gigantic combination that was ever organized on earth—expect to break it up, they have got to send the men who work for it to the penitentiary, in order that hereafter they will not be able to get anybody who is willing to go to the penitentiary for them. Take that man Clem. Why, gentlemen, Clem knew that the authorities of Texas knew something that he knew, and we had him between the devil and the deep, blue sea, but they gobbled up Clem just about the time the State began to
63 gobble him up, and they put him in employment at Dallas. How did they gobble him? They can gobble anything. There is nothing for them too big for them to gobble. They just gobbled his company. They had just as soon swallow a corporation as a man. It don't make a bit of difference how big the corporation or how small the man. There is nothing in the world that will stop them unless it be the walls of the penitentiary; that's all; so they gobbled Clem up, and before that Clem was weeping and wailing and gnashing his teeth, poor Clem, poor fellow! going, going, going down, down, down to destruction and death in business before the terrible power and influence of this combination. The Eagle Refining Company was then trying to be a competing company. It was trying to live in Texas and sell a little oil, but the more oil it brought here the nearer it starved to death. That's the way they did. If a fellow was to bring five gallons of oil in here and try to sell it, they wouldn't pay any attention to that, maybe. If he brings ten barrels, they will cut oil a cent. If he brings twenty-five barrels, they will cut oil 2 cents. If he brings a hundred barrels they will cut it three, and if he brings a thousand barrels they will starve him to death. They can do just what they please. It don't make any difference what it is. The Czar of Russia is a pigmy in

comparison to this organized institution in this country; so Clem's company thought discretion was the better part of valor, and in October, 1894, just a month before this bill was filed, Clem was in St. Louis. He was called to St. Louis to see Mr. Rose, the managing man of the Eagle Refining Company, and they walked down the street, and Mr. Rose goes up into the president's office of the Waters-Pierce Oil Company, and they come down, and Mr. Clem comes back to Texas, and during that time, Mr. Clem says, the Waters-Pierce Oil Company and this Eagle Refining Company made a trade, and he went to work for the Waters-Pierce Oil — under an alias of the Eagle Refining Company. About that time Mr. Clem sees an officer with an attachment to take him to Waco to tell what he knew. Knowing, as they did, that Clem knew enough to pen the whole business, they commenced then to find some way to keep Clem from telling what he did know. We got him on the stand here. I asked him—I says, "Mr. Clem, didn't you write a letter to the attorney general of Texas"—I knew I would have to commence that way if I got
64 anything—"in which you wer- making complaints that it was utterly impossible for you to live in Texas and do business in opposition to this grinding monopoly; that the Waters-Pierce Oil Company had established a trust and something had to be done to relieve the people?" "Yes; I did." "Well, was that true?" "Yes, sir; that was true," but it liked to have killed him. Did you see how near he came dropping out of his chair? He could hardly sit up; couldn't sit up straight. That man was sitting there in a court of justice, knowing the fact to be, as he said, that he must either refuse to testify to facts or loose his job. Now, if these people are so innocent—if they are not in violation of this law—why don't they walk up like men and tell it? Why are they hiding out all over the United States, and why don't they come here and face the music? Why don't they come here and tell it? Innocent men don't flee from honest courts. The State of Texas hasn't got the power to bring them here. Nobody is keeping them away from here, but they don't come. Not only will they not come themselves, *and* actually undertake to instruct a witness how to swear when the Texas grand jury gets hold of them. Here is the vice-president of this corporation, the Waters-Pierce Oil Company, who is sending instructions to his agent. It seems that from some cause or other it was known in the city of St. Louis on the 10th day of November, just eleven days before this bill was filed, and while the grand jury were investigating this case, it was known in the city of St. Louis what the grand jury in McLennan county were doing. It was known that the people of Texas were being aroused; that they had stood it as long as humanity could be called upon to stand anything; that they had submitted to wrong and tyranny and oppression and infamy and robbery till patience ceased to be a virtue and until the truth would have to come out or the people would have to force it out. What instructions does Clem get? A. M. Finley, the vice-president of this corporation, sends him the following instructions: "I judge from Mr. C.'s statement (that's Clem) and the clip-

ping from a Waco paper that the inquiry of him will probably be directed only to the company's methods of meeting and overcoming competition." Meeting and overcoming competition—methods of monopolizing trade, that's what that means; methods of destroying competition. Still here comes a voice from the citadel of power
65 itself. From the very throne itself upon which the monarch is seated comes a voice as to the methods of the company in meeting and overcoming competition, and still they undertake to prove by witnesses from all over the State of Texas that the markets of Texas were open. "Can't anybody come into your town who wants to sell oil?" Of course they can come in here and sell oil, but they won't have any oil in them when they get out of there; there won't be a drop of oil left in that fellow when he gets out of that town. A fellow likes to carry a little oil out as well as in. "Methods of meeting and overcoming competition in Texas." They talk about a State like it was a little bit of a ten-acre field. They can handle a State as well as you can handle a ten-acre field, and a heap better. "If this is so, he should have no difficulty in answering all questions without fear or embarrassment." Well, what is there to embarras- a man if he is going to tell the whole truth? There is nothing to embarras- a fellow because he is going before a grand jury if he is going to tell the truth. Listen. This is Finley talking now. Finley sent this letter to Clem as his (Finley's) instructions and Clem adopted them. Finley is the vice-president of the Waters-Pierce Oil Company. "Whatever the line of examination may be, however, he should not volunteer any information." Isn't it the duty, gentlemen, of every citizen of this country that has the welfare of the people at heart to volunteer information in order that courts of the country may get light against people who are violating the law? Isn't it the patriotic duty of every citizen that loves his country to give information to the authorities to enable the courts to formulate bills of indictment in order to stop violations of law? That is a part of the duty of the citizen. You must not volunterr, says Mr. Finley to Mr. Clem; don't volunteer any information; you just play hush just as much as you can; take care as near as you can; we are in a bad fix; take care of us if you can. "Nor disclose present relations of the company. To be sure, he will answer question- truthfully;" bound to. The truth must be told, but you mustn't volunteer to tell the truth, and if they get on the question of "meeting and overcoming competition" he ought not to get embarrassed. Whatever the line of examination should be, however, you should not volunteer any information nor disclose present relations of the company. To be sure, he will answer questions truthfully, but
66 you mustn't volunteer to tell the truth, but should only answer according to his knowledge of a fact, and knowledge of a fact means actual knowledge and not merely information or reasons or suppositions or beliefs, and if he is placed in a position where he has no alternative, if you get the man down to a corner so he has got to give us away, dodge behind the privilege and don't criminate yourself. Now, gentlemen, if there was not something there to give

away, if there was not something there upon which Clem was expecting to be questioned and that involved criminality, why should they be so careful? That letter which is indorsed and set out by Finley, the vice-president of this company, is an absolute confession, and ought to be so regarded by any honest jury on top of God's green earth. It is a confession of guilt; it stands here naked before this jury admitting the facts alleged in that bill, undertaking to hedge around the truth and keep it from the juries of the country. "When he has no other alternative than to divulge the facts or tell an untruth, he should decline to answer at all upon the ground that by so doing he might criminate himself; this he can consistently do, for if the existing arrangement"—arrangement! What is the existing arrangement? Why, they said there was not any connection between the Waters-Pierce Oil Company and anybody else; that it was an independent business in Texas; but when they are writing to their people, who are expected to be used as witnesses in this case, they say the "existing arrangement," and if it is a violation of the trust law you are just as guilty as the rest of us, and you had better watch, Brother Clem; you had better watch or you'll get yourself into the shackles. "For, if the existing arrangement is a violation of the trust law," he is liable with the others; he is as guilty as the balance of the gang. Well, that is true. Why, they say, we ain't got any law at all. I don't reckon, if we would allow these fellows to construe it, we would ever have any law; but the people of Texas are construing this law and the courts here. They want to go into the United States court to take it away from the people, in order that those who are suffering shall not have the opportunity to apply the remedy.

Judge CLARK: Does your honor think that the counsel is permitted to go out of the record in any such style? We raise the objection that he is entirely out of the record. There is no
67 evidence that this case has ever been intended to go to the United States court, and couldn't be removed under the law.

The COURT: The court has already settled that.

"I do not mean to say that the law has been violated in any respect, but it is desirable to avoid, as far as possible, disclosing any such facts upon which such charges could be based by competitors." And I say, gentlemen, that this letter that Finley has sent down here came from the very sanctum *snac*torum of power, from the place where brotherly sympathy or humanity has never entered; where nothing is seen or regarded but the clink of the dollar, and it is absolute evidence of guilt, and there is not a man on earth who understands language but what knows it. I asked Mr. Clem when he was on the stand, and you remember Mr. Clem, who was at that time working for this company, says that it was the policy of the Standard Oil trust to control the manufacture and sale of oil in this country; and he further stated the policy of the Waters-Pierce Oil Company. In answer to the question if he was acquainted with the acts and doings of that company, he says that the policy of that company, in case competition should come within its territory, was

to cut prices to such an extent as to drive out competition, and after competition was driven out that its old prices were restored; and further stated that — policy of the company and its instructions to the agents was not to sell any oil to those who dealt with competing companies. So they not only fixed the price, but stifled competition; but there was another witness here, gentlemen of the jury, who told you that he had made a trade with the company. I do not remember his name, but you will remember the facts. He comes here and says he made a trade with the Waters-Pierce Oil Company's agent by which he was to take oil at 10 cents, but bind himself not to sell to anybody at any other price except two gallons for a quarter, and he was not to let anybody that bought oil from Waters-Pierce Oil Company's competitors have a bit of oil, thus fixing not only the price of buyin-, but also the price of selling. If that was not establishing a standard of price, what do you call it? There is another contract in this record with a witness. He made a contract in which he agreed to take Waters-Pierce oil at a certain price, and put up a forfeit of $25.00 in order to insure that they would let him
68 have it for a certain price if he would deal with them exclusively for a certain length of time. What was Echols' experience? Echols tells you, gentlemen of the jury, that he went down here to Temple and tried to start an oil business. Why, Echols is a brave man. I am surprised that he ever tried it. I would not have tried it. If I had five millions of dollars I would not have tried it. What is five millions of dollars? What is five millions of dollars to these folks? Why, it don't amount to anything; not a thing; but Echols concluded that he would try to do business in Temple. He went down there and he put his little money he had, twelve or fifteen hundred dollars. I know you think he is a fool, and I am not surprised if *the* was a fool. He knows he was a fool now; we all know it. He went down there alone and started an oil business. I will tell you why he was a fool. He thought this was a free country. He had heard people talk about Thos. Jefferson, and he thought this was a free country. He had heard that there is such a thing as a Constitution of the United States and of all men being free and equal and all this sort of things that formed a part of the basic principles upon which this Government was founded, and the writings of the fathers are full of such sentiment as that. Echols thought that this was a free country, but Echols was a fool. This is not a free country. This is a country absolutely owned and controlled by that combination of which the Waters-Pierce Oil Company has got it allotted here just like he owned it and was farming it. So he went down there and built him a tank. The first thing that he knew his oil was costing him 16 cents and other oil was 18 cents, two cents difference. The next thing Echols knew oil was cheap. He didn't know what in the thunder was the matter with oil. All they had to do was to touch a button in New York city and oil would drop to a cent a gallon if they wanted it to (referring to the Waters-Pierce Oil Company); nothing but a button; touch a button in New York city and oil would drop

down to 10, or 5, or 15 cents; touch a button in St. Louis and it would go to one-half a cent a gallon; touch a button in St. Louis again and it would be given away; don't make a bit of difference with them, because somebody said they could put it down in Temple and up somewhere else, and it would amount to the same thing to the company. Of course, when they get absolute control of
69 a country and can put oil at 5 cents in Temple and put it up somewhere else what difference does it make with these fellows. They have got the earth and the fullness thereof and everything in it. So Echols goes down there and actually undertakes (being nothing but a man)—he undertakes to run an oil business in Temple, and he kept a-swinging to it a little while. He was a bold fellow. He would order some oil and he would drop down his figures a little. As he would drop down they would cut a little lower down—they would go a little lower. They call that competition. It is no such thing. It is monopoly. That ain't legitimate competition. That is a course of procedure inaugurated by them to stifle competition. Why, they come before the courts and say, "Ain't a man got a right to ask what he pleases for what he has got?" Yes; provided he is not asking what he pleases for a purpose. He has got no right to get complete control of a commodity and go into the market and ask what he pleases for it with intent and purpose to drive everybody else dealing in that article out. It is an old maxim that you must use your own so as to not hurt another. If you adopt a policy in your dealings that is intended to destroy the rights of other people, then you are violating the principles of your Government and you are violating the laws of your State—that is what you are doing. They say, "Can't a man do what he pleases with his own? If he wants to sell oil at 10 cents a gallon he has got a right to do it." Yes; provided he is doing it in the right sort of way and for a right sort of a purpose. Echols went there, as he says, with the intention of doing a legitimate business, and oil was higher than it ought to be and he thought he ought to have a right to do business. He went into that market and they cut until they cut down six or eight cents, and finally Echols says, I had to quit. Yes; of course, he had to quit. They took that man up when he was trying to make an honest living—trying to do an honest business—and put him upon a gridiron and they poured Waters-Pierce oil on him and they put a match to him and broiled him until all the juice was out of him. They burned him until they owned his plant and everything else connected with his plant.

Do you remember the story that was told by Lewis or somebody in Lockhart? They bought some oil there and the Waters-
70 Pierce Company sent an agent up from Galveston by the name of Keenan, who, it seems, was manager of their company. He was overseer of that part of the Waters-Pierce oil plantation, and he comes and appears in the market, and he goes to this witness, and he says, I understand that you are buying oil from Rice, or from some other competing company. "Yes; I thought I would buy a little." "Well, that won't do." "Why, Mr. Keenan,

it seems to me that there is nothing peculiarly sacred about the Waters-Pierce business. Everybody has competition, and why don't you?" "That is so; and my individual opinion is that it ought to be that way, but it ain't." The Waters-Pierce Oil Company don't intend to permit any competition, and it is going to control the price of oil in Texas. It doesn't make any difference what it costs. That's the overseer talking to the slave. Slavery was not abolished in 1865. We read in history that it was abolished, but the immense power of combined wealth that has been inaugurated in the United States since is establishing over this country as galling a system of slavery as that which existed prior to 1865. Tear out from your books all these maxims of liberty and all these principles of liberty that have been written in there and come square down and look the facts right in the face and admit that you are a slave. Cross your hands and let them put the shackles on you, because if a man is going to control me in my business I had just as soon he would control me in anything else. The execution of the law is in your hands. The State of Texas may put its machinery to work; it may go down into its treasury and pay its money to procure testimony; it may employ its officers to break up these combinations, but if the juries of this country fail to do their duty she stands as powerless before these corporate trusts as a new-born babe. They put the defendant on the witness stand in this case, and he tells you that he don't know Rockefeller; he don't know this and that and the other; that he has not got anything to do with it. If you believe from this testimony—and you cannot doubt it, because nobody is disputing it—that the Waters-Pierce Oil Company is engaged in a combination in this State—I don't care who that combination is with—and that the purposes of that combination are to control and monopolize the price of kerosene oil, and if you believe that Mr. Hathaway *has* is acting under its direction and is carrying
71 out its policies in Texas—and the testimony on that is conclusive and undisputed, admitted by himself—if you believe that—it doesn't make any difference who the defendant is or where he came from—it is your duty to find him guilty. I haven't got time to go over all this testimony, but you take Vogel's testimony; take those letters—Keenan's letters—that show the policy of this company. They show that their agents are all pursuing one line. There is no difference whether the man be in Nort- Texas or whether he be in McLennan county or San Antonio or Austin or Lockhart or in Houston or anywhere in this great and glorious State. The same line of conduct is adopted, and it comes from some central head, and where you get the instructions of one you get the instructions to all. Here is the general instructions to all agents. (Here Mr. Taylor read the circular "To all agents.")

Whenever a fellow begins to sell oil, here goes the circulars: "To all agents" of this State: Look out for that fellow, boys; he is about to try to compete with our master. Look out for him. "Please look out for him, and should he visit your town take immediate steps to prevent him from taking any orders." Don't make any difference what part of the plantation that fellow got onto—whether

he got on Hathaway's plantation or Hawkins' moral vineyard, or whether at Galveston or at Forth Worth; it don't make any difference; the rules of the company were the same.

All Hawkins had to do in Waco was to walk into a store and every fellow would begin to tremble, because here came the representative of the most monstrous monopoly that the world ever conceived of. "You know the rules." "Yes; we know them;" and they did. You can hardly get these fellows here to tell on them; they are afraid the Waters-Pierce Oil Company will water the oil and make them buy it. They are writhing in the jaws of a monster and they do not know what to do with themselves or their business, and all Hawkins had to do was to step right out of the Methodist church or some other place and step into one of those stores and say, "You know the rules, boys; you had better come to time," and they came to time; and so it is. "Please look out for him, and should he visit your town you will take immediate steps to prevent him from taking orders by following out the instructions given you by Manager Finley in a recent circular." What do you think of that? What do you think of a community that has such a thing as that? Ought you to punish it? You don't deserve to be a freeman if you don't. "Also please advise us by wire should Mr. Wagner visit your town." Every time that Wagner, who was representing the Rocky Mountain Oil Company, got into a town the Western Union wires got hot, and they staid hot until Wagner left, and they staid hot until all Wagner's oil left, and they staid hot until this monopoly had rehabitated itself—put itself back into the absolute and complete control of the business in that town. It is so. Here is another letter. If we had some letters that they have got stuck away we would open the eyes of the people of this great State.

(Here Mr. Taylor read the letter addressed to agent at Velasco.)

"But those who buy rice oil won't get any protection." Now, that is so. Here is another one. Now, listen here. This comes from the manager, A. M. Finley. Still they tell you that they are not trying to create restrictions in trade and monopolize prices of this product. "Dealers who buy at these figures must agree to retail brilliant at two gallons for a quarter." You must make these people agree to sell at a bit a gallon, if you let them have oil at these figures. Do you suppose that they were animated by any love of humanity in making oil cheap there? Have you ever heard of that sort of a gang ever having any love for the human race? Do you suppose that these instructions that come from headquarters were in the interest of the people of Texas? No; it was for the purpose of putting oil at retail prices in that market cheaper than the wholesale figures at which it was being sold by competitors, for the purpose of getting absolute control of the market. "Dealers who buy at these figures must agree to retail at two gallons for a quarter. These figures will cause our competitors loss." I could go on here and recite just such cases as these in evidence from now until tomorrow evening. It goes to show absolutely and conclusively that these people have undertaken

to monopolize and control and regulate the price of oil in this State. Competition was a great theme with them. Every movement that they made, every turn that they made, all the letters that they wrote, all the circulars that they dictated, everything, as if by one common consent, throughout the State of Texas, through all the divisions and subdivisions, and through all the local agencies, one voice only came, and that was, "Stifle competi-
73 tion, drive out competition," and in order to do it we put at your back a power of two hundred millions of dollars of wealth. This is the way it is being done, and this is the way it is being successfully maintained. Remember what Voss said about his efforts to do business in Gatesville. He finally went in with them and made a contract. Now, gentlemen of the jury, I have given you only a skeleton of the immense amount of testimony introduced in this case. I have done my duty as far as I understand it. The State of Texas has used all its efforts to get testimony before a jury of McLennan county in order that we may make a test case—to see whether this trust law amounts to anything or not. If this party is not guilty here we had just as well tear that trust law up. If he is not convicted, there is no use in wasting our substance on any more desert air. If he is not convicted can't any of them be convicted, because his guilt hangs upon the question of his agency of the Waters-Pierce Oil Company, and that makes him a co-conspirator in the whole business; and if you cannot reach the agents of this trust, just turn the trust loose—let her go, Gallagher—and quit talking about it. Submit; put your necks under the yokes, and if it does rub the hide off, grin and bear it, because there is no use of our undertaking to work our lives out in getting evidence before the jury unless we have got a case here. If we have not any case here, there never was or never will be one in the State of Texas. If there is no case here, there can't be one made under that law; ain't no use in being mealy-mouthed about it; that is the God Almighty's truth, and anybody that knows anything about this evidence knows it is the truth. We have brought it here—we have arrayed before you facts and figures that cannot lie. We have demonstrated to you an absolute monopoly of oil in Texas. We have demonstrated to you every single thing that is required to be demonstrated in an investigation of the violation of that law. We have the decisions of the courts of Ohio declaring this Standard Oil trust illegal; we have our own statutes; we have the decision of the supreme court of the State of Texas holding that the trust law is good; we have got all the facts before this jury that human ingenuity and the power of the State of Texas can bring, and it remains for you to say whether this system shall be perpetuated or whether you will break it up. Individuals should cut no figure
74 in it. What is one man compared to the great public weal? What is one man compared to the protection of the entire State? What is he? You must let it be known that if men accept employment to carry out the purposes and policies of this institution in Texas they are subject to the punishment of the State of Texas. Why should they be exempt? The law says, if any man

acts as agent for any person or under his employment, he is guilty. If I am in the State of Missouri and I hire a man to come in the State of Texas to carry out my instructions and commits a crime, and he does it, I am guilty of the crime, and so is he. Why are you going to make a distinction here? Is it any less culpable for a man to be employed to carry out the behests of the combinations that are squeezing out of this country three millio-s of dollaes per annum? Away with sentiment and sympathy and let us have a law executed in this country in the name of common sense. If you expect the courts and the law to be respected, you, gentlemen of the jury, must carry the laws into execution. We cannot do it; it is utterly impossible for us to do it.

Now, gentlemen of the jury, I am going to close. I have done all that the law requires me to do. The balance is for you, after hearing the argument of the counsel and the charge of the court. But, as far as I am concerned, I have no fears but that you will do what appears to be your duty as honest men, placed here and given the responsibility of executing this most important statute.

75 *Copy of Opinion of Court of Criminal Appeals in the Case of Hathaway vs. The State of Texas.*

E. T. HATHAWAY, Appellant,
vs.
THE STATE OF TEXAS, Appellee. } No. 938. 5th Assignment. Appeal from McLennan County.

Opinion.

Appellant was convicted of engaging in a conspiracy against trade and his punishment assessed at a fine of fifty dollars and prosecutes this appeal.

1. The indictment is in six counts. The first count is as follows:

"That in said county of McLennan, State aforesaid, on or about October 1, 1894, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, and F. A. Austin did unlawfully agree, combine, conspire, confederate, and engage, with William E. Hawkins and divers other persons to the grand jurors unknown, in a conspiracy against trade, then and there, with the said William E. Hawkins and the said other persons, creating a trust, by combination of their capital, skill, and acts with the said William E. Hawkins and other persons, for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, by keeping the price of said oils at a certain price per gallon and at a certain price as otherwise sold, which price was far above the true market price of said oils,

and for the purpose and effect to pr-vent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of said products and to raise the price thereof above the true market value, and cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities and products of prime necessity to the people and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, all the products of petroleum, illuminating oils, and lubricating oils, whereby the price- thereof were and are established and fixed in said county of McLennan at a fictitious value greatly in excess of the true market value; and the said John D. Rockefeller, William Rockefeller, Henry M. Flagler, Benjamin Brewster, John D. Archbold, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruett, E. Wells, Wm. Grice, E. T. Hathaway, and F. A. Austin did then and there uniawfully make and enter into a trust, combination, contract, agreement, obligation, and conspiracy with the said William E. Hawkins and other persons in said county, and all of said persons did agree, combine, conspire, confederate, and engage with each other and among themselves that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils below a certain price, which price was and is far above the true market value of said commercial commodity, and that they would fix and keep the price of said oils in said county at a certain price and graduated figures, and that for the purpose of establishing and setting the prices of said oils amongst themselves and to
76 preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipments of said oils they agreed to pool, combine, and united their interests in the manufacture, production, trade, and shipment of said oils, so that the price thereof would be affected and fixed at a certain figure, against the peace and dignity of the State."

So far as this appellant is concerned, the four succeeding counts are similar to the first count above quoted. The sixth count is as follows:

"And the said grand jurors aforesaid upon their oaths in said court do further present that on or about the second day of January, A. D. 1892, many corporations, partnerships, firms, and individuals controlling, owning, and operating 95 per cent. of the capital invested in petroleum, its products, refined oils, illuminating oils, and lubricating oils, and in the manufacture, sale, and transportation thereof, met at some place in the United States to the grand jurors unknown, and organized themselves into a trust, combination, conspiracy, and confederation with each other and among themselves to organize a monopoly to control the oil trade in the

United States; that there were about 39 corporations, partnerships, firms, and individuals who entered into and bound themselves by said trust, combination, and agreement, and that they were scattered over many States of the United States, and owned, controlled, and operated almost the entire petroleum-oil industry of the United States, and that the purposes of said trust, conspiracy, combination, and agreement were to organize said corporations, partnership-, firms, and individuals into an agreement, combination, and trust to be known as the Standard Oil trust, for the purposes of mining, manufacturing, producing, refining, and dealing in petroleum and all of its products and all the material used in such business, and transact other business collateral thereto, and for such other purposes and powers as should be embraced in the several charters, such as should seem expedient to the parties thereto *and for such other purposes and powers as should be embraced in the several charters, such as should seem expedient to the parties thereto* procuring charters; that, aside from the ostensible purposes already mentioned, the agreement, conspiracy, and trust were created and organized for the purpose of absorbing and controlling and monopolizing the petroleum-oil industry of the United States, and that said thirty-nine corporations, partnerships, firms, and individuals also entered into and organized said agreement, conspiracy, trust, confederation, and combination known as the Standard Oil trust, for the purposes of, first, creating and carrying out restrictions in trade; second, of limiting the production and increasing the price of petroleum and its products, the same being a commercial commodity; third, of preventing competition in the making, manufacture, and transportation and sale of petroleum oil and its products; fourth, of fixing at a certain standard and figure the price of petroleum oil and its products, whereby their prices to the public would be controlled and established, and said products being of prime necessity to the people for use and consumption; fifth, for the purpose of binding themselves not to sell, dispose, and transport petroleum oil and its products at a fixed and graduated figure, and to establish and settle the price of petroleum and its products at such figures so as to preclude a free and unrestricted competition in the making, manufacture, sale, and transportation of petroleum and its products, and for the purpose of pooling and combining their interests in the making, manufacture, sale, and transportation of petroleum and its products in such a manner that the price thereof would be affected, the said petroleum oils and its products being an article of trade and commercial commodity; that each of said corporations, partnerships, firms, and individuals agreed among themselves and with said trust to form in the States where they were respectively domi-
77 ciled a corporation known as 'The Standard Oil Co.' of the State where formed, and to become a part of the trust known as the 'Standard Oil trust,' and that many such corporations, in pursuance of such agreement and trust, became a member and part of said 'Standard Oil trust.' The corporations, firms, individuals, and corporations formed in pursuance of the

agreement mentioned agreed to transfer and assign, and did transfer and assign, all their stock to nine trustees of the 'Standard Oil trust,' to be held by said trustees indefinitely; that said corporations, firms, and individuals agreed that nine trustees should be appointed to take charge of, control, and operate the affairs of the 'Standard Oil trust,' and that a certain number of trustees should be elected annually after the election of the original trustees; that said trustees were required, empowered, and authorized to issue trust certificates to said corporations, partnerships, firms, and individuals in consideration for their said stock delivered and transferred to said trustees; that the value of said trust certificates so issued amounted to many millions of dollars; that the general office of said 'Standard Oil trust' should be in New York city, and that the headquarters and general offices of the said nine trustees should be and remain in New York city; that the said corporations, partnerships, firms, and individuals then and there, on the 2nd day of January, 1882, agreed and contracted that the 'Standard Oil trust' should be perpetual, and that it has existed since said agreement and trust, and that its general offices and headquarters and the general offices and headquarters of the said trustees are now situated and located in New York city, State of New York, pursuing and carrying out the purposes of said trust, conspiracy, combination, contract, and confederation, as hereinbefore detailed and stated; that said trustees are now engaged in carrying out, enforcing, and executing the terms and provisions of said trust, combination, conspiracy, and contract between said corporations, partnerships, firms, and individuals, and said 'Standard Oil trust' is now in full force and effect and have been since the 2nd day of January, 1882, controlling, managing, and directing ninety-five per cent. of the capital invested in the petroleum industry, and that the value of said trust certificates now in existence is about $200,000,000; that the trustees of the Standard Oil trust now in office are composed of the following-named persons, to wit, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, and Wesley H. Tilford, and that said trustees are now carrying out, enforcing, and executing the trust agreement and conspiracy hereinbefore set out; that said trustees have divided the market for petroleum oil and its products into various subdivisions between the members of the 'Standard Oil trust,' allotting to each corporation, firm, member, or individual of said trust a certain State or States in which to have the exclusive right to sell petroleum oil and its products; that the Waters-Pierce Oil Company, a corporation domiciled in the State of Missouri, has been allotted the market and territory lying in the States of Missouri, Arkansas, Louisiana, and Texas, and had the exclusive right to sell petroleum oil and its products in said States, and that the other members of said 'Standard Oil trust' are bound by said trust not to invade said territory and sell therein; that the Waters-Pierce Oil Company has the exclusive right to sell petroleum oil and its products in Texas and in McLennan county, Texas; that the officers of said Waters-Pierce Oil Company are as follows: Henry Clay

Pierce, president; Arthur M. Finley, vice-president; C. M. Adams, treasurer; J. P. Gruet, secretary, and E. Wells, auditor, and that Arthur M. Finley, vice-president, lives in Galveston, State of Texas; that said trustees of the said 'Standard Oil trust' and said officers of the Waters-Pierce Oil Company, in pursuance of the trust, agreement, and conspiracy hereinbefore set out, have subdivided Texas into four grand divisions in which to sell oils of the Waters-Pierce Oil Company, and have appointed an agent for each grand division and many local agents for the various towns and counties of Texas to sell their said oils; that said various local agents are acting under the supervision, direction, and orders of said trustees and said officers of the Waters-Pierce Oil Company and send daily reports of their said sales of oil to said trustees and officers; that William E. Hawkins, among many others, is the representative and local agent in McLennan county, State of Texas, and by agreement is acting with, conspiring, and confederating with said trustees of the Standard Oil trust and the said officers and agents of the Waters-Pierce Oil Company, and is carrying out, enforcing,
78 and executing in McLennan county, State of Texas, all the provisions, terms, and stipulations of said trust, conspiracy, contract, combination, and confe*red*ation, and was doing so on the first day — October, 1894; that on or about October 1, 1894, in McLennan county, State of Texas, in strict pursuance of and in accordance with said designs, agreements, trusts, combination, and conspiracy, contract, and confederation and to carry out and execute said purposes, as hereinbefore detailed and set out, John D. Rockefeller, Henry M. Flagler, Wm. Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and Wm. E. Hawkins did unlawfully agree, combine, conspire, and confederate with each other and among themselves and with divers other persons in McLennan county, to the grand jurors unknown, in a conspiracy against trade, then and there creating a trust by a combination of their capital, skill, and acts with each other for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being articles of trade and commercial commodities, by keeping the prices of said oils at a certain price per gallon or at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating and lubricating oils, and to limit and reduce the production of said products, and to raise the price thereof above the true market value, and to cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all their products, refined

oils, illuminating and lubricating oils, the same being commercial commodities and products of prime necessity to the people, and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, their products, refined oils, illuminating and lubricating oils, whereby the prices thereof were and are established and fixed in the said county of McLennan, State of Texas, at a fictitious value greatly in excess of the true market value, and did then and there unlawfully make and enter into and make a trust, combination, contract, agreement, obligation, and conspiracy and did unlawfully agree, combine, conspire, confederate, and engage with each other that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, their products, refined oils, illuminating and lubricating oils, below a certain price in McLennan county, State of Texas, which price was and is far above the true market value of said products, and that would fix (and did fix) and keep the price of oils in said county and in said State at a certain price and graduated figure, and that for the purposes of establishing the prices of said oils and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of petroleum, its products, refined oils, illuminating oils, and lubricating oils, all the said above-named persons agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade, and shipment of said products and oils, so that the price thereof would be affected and fixed at a certain figure, and the prices of said oils were affected and fixed at a certain figure, and free and unrestricted competition in said oils, products, and articles of trade was prevented and destroyed; the prices of said oils were fixed and established and free and unrestricted competition prevented in the following manner, to wit: All the above-named persons, in connection with divers other persons to the grand jurors unknown, would bring their oils into the various towns of Texas and into McLennan county, State of Texas, and where they found competition in the sale of their oils would immediately cut prices far below a profitable selling price and would not sell their oils to any dealer who would not agree not to purchase any competitive oils, and by reason of their immense power, wealth, fortunes, trusts, mutual combinations, and monopolies keep said prices at said
79 unprofitable figures until all competition had been crushed and destroyed and all competitors had fled the market and towns of said State and McLennan county, when they would raise the prices of their oils far above the true and honest market prices and exact unreasonable and exorbitant prices from the actual consumers, and then and there keep fixed and established said prices; that in the manner, by the methods, and through the trusts hereinbefore described the said persons have carried restrictions in trade, increased the price of petroleum, its products and oils, and have destroyed competition in the manufacture, sale, and transportation of oils, and have fixed the prices of oils at a standard figure so as to control the price thereof to the public, and have pooled, combined, and united their interests in the manufacture, sale, and

transportation of oils in such a manner as to affect the price thereof, and have greatly increased the prices of oils to the people in McLennan county, State of Texas; that the Waters-Pierce Oil Company, acting with said trust, controls and manages 99 per cent. of the oil business in Texas, and that said business amounts to a half a million barrels annually, against the peace and dignity of the State."

This indictment was framed under the act of March 30th, 1889. The clause of said act under which it was framed reads as follows:

"Art. 981. Any violation of either or all the provisions of this law shall be, and is hereby, declared a conspiracy against trade, and any person who may be or who may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute separate offense." (See art. 981, new Rev. Code Crim. Pros.)

This act, according to the construction we place upon it, constitutes two distinct character of offenses. The first portion thereof makes all persons who may be or may become engaged in a conspiracy against trade, or who take a part therein or aid or advise in its commission, offenders. The latter portion of said act makes those criminal who shall, as principals, managers, directors, agents, servants, or employés, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof—that is, two or more persons may enter into a conspiracy against trade and become liable thereunder criminally, and others, after the conspiracy has been formed, may enter into said conspiracy and become amenable as co-conspirators with those originally forming the trust or combination, and after a conspiracy against trade has been formed any persons, though not himself a conspirator, if he shall, as principal, manager, director, agent, servant, or employé, carry out
80 the purposes, prices, rates, or orders of such conspiracy, then he becomes a violator of this statute. But it will be noted that in order for the latter to become amenable he must knowingly serve the trust in one of the capacities mentioned—that is, he must know that the trust or conspiracy against trade has been formed, and with such knowledge he must serve the trust in some capacity in carrying out its purposes—that is, he may be a conspirator, and then he may serve the trust in the capacity of an agent or servant, and in such case an indictment charging him simply as a conspirator, with proof that he was such, would be maintained, notwithstanding the evidence also showed that he was an agent or servant of the company. In the case at bar it will be noted that there is no count that charges appellant as an agent; all charge that he was a

party to the conspiracy, either as an original party or one who attached himself to it after its formation. This being the case, to sustain the conspiracy the proof must show that he was an original party to the conspiracy or that he joined it after its formation. Proof that he was an agent would not be sufficient, unless it went further and showed that he knew of the conspiracy. In order to convict a persons of being an agent of a conspiracy, such as described in the statute, the indictment must allege that fact, and must also allege that he knew of the conspiracy. Upon the trial of this case all proof which tended to show the agency of appellant was absolutely worthless without the further proof that he knew of the conspiracy.

The statement of facts contains a little over two hundred pages of typewritten matter, and we have given the same a thorough examination, and there is no evidence showing that the defendant was one of the original conspirators composing the trust or that he afterwards entered into and joined said conspiracy.

The sixth count in said indictment charges John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford as being the trustees of the Standard Oil trust, now carrying out the provisions of said trust. It alleges that thirty-nine corporations, partnerships, firms, etc., went into and compose said trust, and that it was formed in the year 1882 and still
81 continues; that the Waters-Pierce Oil Company, a corporation of the State of Missouri, was one of the corporations that entered into said trust and formed a part thereof, and that Henry Clay Pierce is president; Arthur M. Finley is vice-president; C. M. Adams, treasurer; J. P. Gruet, secretary, and E. Wells, auditor. And it further charged that John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, and E. Wells (the same parties alleged to compose the Standard Oil trust and the Waters-Pierce Oil Company), together with William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins—the first three divisions agents in Texas of the Waters-Pierce Oil Company, and the latter, Wm. E. Hawkins, the local agent of said Waters-Pierce Oil Company in McLennan county—did unlawfully combine, conspire, and confederate with each other and among themselves and with divers other persons in McLennan county, Texas, to the grand jurors unknown, in a conspiracy against trade, etc.—that is, it would appear that the conspiracy is charged to have been entered into between the trustees of the Standard Oil trust and the officers of the Waters-Pierce Oil Company and three of the division agents in Texas and one of the local agent-, to wit, Wm. E. Hawkins, of McLennan county. There is some proof in the record to the effect that the trust was formed as early as 1882, between some thirty-nine corporations, firms, individuals, and partnerships, and that the first seven named conspirators were the trustees of said trust or combine, which was known as the Standard Oil trust, and

there is some proof in the record that the Waters-Pierce Oil Company was a party to said trust, but aside from the fact that E. T. Hathaway was the agent of the Waters-Pierce Oil Company in Texas, we fail to find any evidence in the record that he was one of the original conspirators or that he entered into the conspiracy at any time after it was formed. Of course, as stated before, the fact that he was an agent, if the proof went further and showed that he was also a party to the conspiracy, would not absolve him from amenability to the law.

We will notice those portions of the record which refer to Hathaway. Hiram Brooks, witness for the State, testified that he lived in Denison, Texas; that he knew defendant Hathaway and
82 that he was known as the agent of the Waters-Pierce Oil Company in Denison; that he did not remember ever to have had any conversation with the defendant about the oil business to amount to anything in particular. He had purchased oil from him or his agents; have had no conversation directly with him; have talked with Mr. Hathaway.

J. M. Cullers, witness for the State, testified "that he lived at Sherman, Texas; was acquainted with the defendant Hathaway and had known him for 10 or 15 years. He has been engaged in the oil business and was agent for the Waters-Pierce Oil Co. prior to November, 1894—that is, division agent; do not know the extent of his authority; did not purchase oil from Hathaway, but from the local agent in Sherman; would send orders to the local agent at Sherman and it would be filled from the depot there. Stratton is the local agent at Sherman. We got the profit allowed jobbers of two cents per gallon; that the oil was billed to them at the price they were selling to the general trade, and the invoice was furnished from Denison by Mr. Hathaway with the number of gallons bought. At the end of the month a statement of the account, less two cents a gallon on what had been bought, was sent up. Hathaway did not furnish us any price-list at which oil should be sold in case competing companies came into the market."

A. W. Clem, witness for the State, testified that he met Hathaway in the spring of 1894; that Hathaway did not know that he (Clem) was an agent of the Waters-Pierce Oil Company; that the defendant had charge of the northern division of the Waters-Pierce Oil Company, with headquarters at Denison.

This was in effect all the testimony offered by the State concerning the appellant, Hathaway.

We quote from the testimony of E. T. Hathaway, given in chief, as follows: "My name is E. T. Hathaway. I reside at Denison, Texas, and have resided there since 1878. I have resided in Texas since 1878, and my present position is agent for the Waters-Pierce Oil Company. I have been such agent since June of 1878. The Waters-Pierce Oil Company did business in Texas prior to 1878, but not under its corporate name. Waters-Pierce & Co. did business prior to that time. They were incorporated in 1878 and continued the business selling oil. I do not know John D. Rockefeller
83 nor Henry M. Flagler nor William Rockefeller nor John D.

Archbold nor Benjamin Brewster nor Henry H. Rogers nor Wesley H. Tilford. I never had any connection with any of these gentlemen, directly or indirectly. I never had a letter from them or either of them or instructions from either of them. I was employed by the Waters-Pierce Oil Company, and that company pays me. My present salary as agent and emplo-é is $2,700 per annum. I knew W. E. Hawkins. I never had any dealings with Hawkins in McLennan county or anywhere else of any character or nature. I never sold any oil in McLennan county. I own no stock in the Waters-Pierce Oil Company, nor do I own any stock in the Standard Oil trust, nor did I ever own any stock in either company. I know nothing about the Standard Oil trust. I am simply an agent on salary. I never knew of any combination between the Waters-Pierce Oil Company and the Standard Oil trust or the officers or either of them. I never did any act knowingly and within my knowledge in the furtherance of the Standard Oil trust or any conspiracy of that kind with trade, in restriction of trade. The oil that I sold came from St. Louis. It is brought in from St. Louis, State of Missouri, and sold in Texas in unbroken packages—that is, it is brought in tank cars as well as in barrels and cases and sold in those barrels and cases. It is kept in stock until it is sold. I know nothing whatever about the management of the Waters-Pierce Oil Company at St. Louis."

It will be seen that the State by its testimony failed to reach defendant with any evidence even tending to show that he was an original conspirator or that he entered into a conspiracy in restraint of trade, which, of course, would apprehend that he had full knowledge of the object and purpose of such conspiracy and its plans of operations, and when we come to consider his testimony his evidence shows that his only connection with the alleged trust was as agent and employé of the Waters-Pierce Oil Co. at a stipulated salary of $2,700.00 a year. A great deal of evidence is presented in this record showing the method of dealing on the part of the Waters-Pierce Oil Company at various points in the State of Texas, but it is remarkable that this testimony is for the most part at other points and in other divisions than that allotted to the defendant Hathaway, and there is not any proof furnished in the record that brings him in contact with any of the methods pur*u*sed by said trust, which is
84 obnoxious to the provisions of the statute in question. Certainly there is no testimony of any connection on his part or that he had anything to do with the oil trade in McLennan county. McLennan county was in another and distinct division and not under his management or control. Not only does the State fail to furnish any affirmative proof bringing him in contact with the transactions of Grice and Hawkins in McLennan county, but by his own testimony he negatives the proposition that he had anything whatever to do with the oil trade or with cutting rates on oil in McLennan county. Quoting from his testimony, he says: "I never had any dealings with Hawkins in McLennan county or anywhere else of any character or nature. I never sold any oil in McLennan county." Of cou-se, if there was any testimony in this

case showing that he was one of the original conspirators, or that he entered into a conspiracy after it had been formed, he might be affected by the acts of the agents of the said trust in McLennan county; but, as we have seen, there is no such testimony. If he had been indicted as an agent for some act done in McLennan county the proof would not have sustained the accusation, because there is no testimony that he acted as such agent or in conjunction with any agent of the trust in McLennan county; nor is there any evidence tending to show that he advised, aided, or encouraged any man in Texas or anywhere else to enter into this conspiracy or to act as agent therefor. If appellant had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment. To hold him responsible as an agent the indictment must allege the fact that he knew of the conspiracy and its purposes.

See Stalls *vs.* State, 37 Texas, 440.
Pressler *vs.* State, 13 Tex. App. Rep., 95.
Hunter *vs.* State, 18 Tex. App. Rep., 444.

II. As we have seen, there is no count in the indictment charging the appellant as principal, manager, director, agent, servant, or employé, or that he in any capacity acted for said trust and knowingly carried out any of the purposes, stipulations, prices, rates, or orders thereunder or in pursuance thereof; and if there had been ever so much proof on this subject the conviction could not have been sustained. However, the learned judge who tried this case seems to have
85 proceeded upon this idea, as is demonstrated from the following portion of his charge, which is quoted as follows:

"And if you further believe from the evidence that at said last-mentioned time—that is, within 3 years next preceding Nov. 21, 1894—either of the defendants William Grice or William E. Hawkins was then and there the agent of said Waters-Pierce Oil Co., and as such agent was at said time engaged in knowingly carrying out in McLennan county any and all of the provisions, terms, and purposes of said agreement and combination so entered into by the said Waters-Pierce Oil Company (if any) as aforesaid, and you further find that at said time this defendant E. T. Hathaway was also agent of the said Waters-Pierce Oil Company, and as such was at the same time engaged as such agent in knowingly carrying out and maintaining the purposes, provisions, and terms of said agreement by the Waters-Pierce Oil Co. on January 2, 1892, as hereinbefore mentioned (if any), anywhere within the State of Texas, then, if you so believe beyond a reasonable doubt, you will find the said E. T. Hathaway guilty as charged in the indictment, and assess his punishment as hereinbefore stated.

"And in this connection you are charged that it is wholly immaterial whether or not he, the said E. T. Hathaway, was at any time in McLennan county.

"You are further charged that the contract offered in evidence dated Jan. 2, 1882, also the supplemental agreement dated Jan. 4,

1882, and which is designated as the 'Standard Oil trust agreement,' includes not only the corporations, individuals, firms, partnerships, and associations of persons therein mentioned, but all persons acting for or in connection with said corporations, firms, partnerships, individuals, or associations of persons, whether they be acting in the capacity of officers, managers, directors, agents, servants, or employés or in any capacity whatever.

"And you are further charged that said contract so made and entered into as aforesaid is a combination, trust, and conspiracy in that it creates restrictions in trade, and if you believe from the evidence beyond a reasonable doubt that at any time within three years immediately prior to Nov. 21, 1894, said contract was in existence and in full force and effect as therein provided, and as such was then and there being executed and carried out in the State of Texas by or through the officers of said Waters-Pierce Oil Co.; and if you further find that the purposes and provisions of said
86 agreement was at said time being knowingly carried out and in force within the State of Texas by the managers, agents, servants, and employés of said Waters-Pierce Oil Co., including this defendant E. T. Hathaway; and you further find beyond a reasonable doubt that at said time during the period last mentioned the purposes and provisions of said agreement *was* knowingly being carried out and enforced in the county of McLennan by W. E. Hawkins or William Grice or any other servant or employé of said Waters-Pierce Oil Co., then, if you should so find, you should find the defendant E. T. Hathaway guilty as charged in the indictment, and assess his punishment therefor as hereinbefore has been directed."

If there had been a count in the indictment charging the appellant as a servant or agent of said trust in McLennan county, Texas, then the charge in question, if it had otherwise been a correct legal charge, would have been applicable under such indictment; but under the indictment in this case it was wholly inapplicable, because, as we have seen, if convicted at all, he could only be convicted as a principal conspirator. The record in this case is exceedingly meager of any acts of appellant done in his own district or division, and such as were there discharged were purely and simply as an agent of the Waters-Pierce Oil Co. Whether he would be indictable for said acts in one of the counties of his own district is not the question here. But the simple question is, Does the record show that he was a conspirator, so as to make him guilty of some act done by the trust in McLennan county, Texas, in restraint of trade? The record fails to furnish us with any evidence that would fasten him to the conspiracy, so as to make him amenable as a conspirator in McLennan county.

III. There are some constitutional questions raised in this case. Some of the questions have been before our supreme court, and it has been decided by that tribunal that the law in the question is constitutional. It is claimed by the appellant, however, that the decision is obiter, and, moreover, that the decision of the question by that tribunal is not binding upon us. While the presumption will be indulged that the decision of the supreme court is correct,

yet a discussion and decision of the question, in the view we have taken, is not necessary in determining this cayse. This question has been before the supreme court in the following cases:
87 Anheuser-Busch Brewing Ass'n *vs.* Houck, 27 S. W. Rep., 696; Houck & Deiter *vs.* Anheuser-Busch Brewing Ass'n, 88 Tex., 184; T. & P. Coal Co. *vs.* Lawson, 34 S. W. Rep., 919, and Walch *vs.* Windmill Co., recently decided.

Because the court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict, the judgment is reversed and the cause remanded.

HENDERSON, *J.*

Filed June 26th, 1896.

P. WALTON, *Clerk.*

The foregoing has the following endorsement, to wit:
No. 2062. Copy of opinion in Hathaway *vs.* The State of Texas. Filed Nov. 28, 1896. J. H. Finks, clerk, by C. A. Richardson, deputy.

88 *Writ of Habeas Corpus.*

United States Circuit Court, Fifth Circuit and Northern District of Texas, at Waco.

The President of the United States of America to J. W. Baker, sheriff of McLennan county, Texas, Greeting:

Whereas it has been represented unto our said circuit court by the petition of William Grice that he, the said William Grice, is now unlawfully restrained of his liberty by and is now held in the custody of J. W. Baker, sheriff of McLennan county, Texas, and upon consideration of said petition our said circuit court has made and allowed the following order, to wit:

"*Ex Parte* WILLIAM GRICE. No. 655.

Upon consideration of the application for *habeas corpus* made by William Grice, it is ordered that the writ issue as prayed for in the application, and that the same be made returnable forthwith before this court, at Waco, Texas":

These are therefore to command you, the said J. W. Baker, sheriff as aforesaid, that you produce forthwith the body of the relator, William Grice, before our said circuit court, at Waco, Texas, and that you then and there certify to said court the true cause of the detention by you of the said William Grice.

Herein fail not, but to the commands of this writ due obedience yeild, lest you suffer the pains and penalties of contempt for the disobedience thereof.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said circuit court, at Waco, Texas, this the 9th day of December, in the year of our Lord eighteen

hundred and ninety-six, and of American Independence the 121st year.

J. H. FINKS,
Clerk of said Court,
[SEAL.] By C. A. RICHARDSON, *Deputy.*

The foregoing has the following endorsement, to wit:

89 655, 2062. *Ex parte* William Grice. Original writ of *habeas* — to J. W. Baker. Issued Dec. 9, 1896. J. H. Finks, clerk, by C. A. Richardson, deputy. Came to hand Dec. 9th, 1896, and was executed same day by delivering a copy of this writ to J. W. Baker, sh'ff of McLennan county, in person. R. M. Love, U. S. M. Filed Dec. 18, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

90 *Return of Sheriff to Writ of Habeas Corpus.*

Filed Dec. 9, 1896; Dec. 18, 1896.

In the United States Circuit Court for the Northern District of Texas, at Waco.

No. 655. *Ex Parte* WILLIAM GRICE.

In obedience to the writ of *habeas corpus* issued in the above styled and numbered cause, and this day served upon me by the United States marshal for the northern district of Texas, at 3.30 p. m., I herewith produce in open court, as directed by said writ, the body of said William Grice, and do further certify that I hold the said William Grice in my custody by virtue of a capias issued out of the district court of 54th judicial district of the State of Texas upon an indictment preferred in said court against the said Grice and others in a certain criminal case numbered and entitled as follows, to wit: No. 871, The State of Texas *vs.* John D. Rockefeller *et al.*, said Grice being charged in said indictment, with others, with having engaged in a conspiracy against trade, in violation of an act of the legislature of the State of Texas entitled "An act to define trusts, and to provide the penalty and punishment of corporations, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889.

Given under my hand, at Waco, Texas, December 9th, 1896.

J. W. BAKER,
Sheriff of McLennan County Texas,
By J. H. LOCKWOOD, *Deputy.*

The foregoing has the following endorsement, to wit:

No. 655, 2062. *Ex parte* Wm. Grice. Return of Jno. W. Baker, sheriff, &c., to writ of *habeas corpus.* Filed Dec. 9, 1896. J. H. Finks, clerk, by C. A. Richardson, deputy. Filed Dec. 18, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

91 *Copy of Orders in the Circuit Court of the United States at Waco, Texas.*

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Waco, Texas, November Term, 1896.

No. 655. *Ex Parte* WILLIAM GRICE.

DECEMBER 9TH, 1896.

Upon consideration of the application for *habeas corpus* made by William Grice, it is ordered that the writ issue as prayed for in the application, and that the same be made returnable forthwith before this court at Waco, Texas.

And thereafter the following proceedings were had, to wit:

No. 655. *Ex Parte* WILLIAM GRICE.

DECEMBER 9TH, 1896.

Ordered by the court that this cause be set down for hearing on December 12th, 1896, and that the defendant be admitted to bail in the sum of $1,000.00.

And thereafter the following further proceedings were had, to wit:

No. 655. *Ex Parte* WILLIAM GRICE.

DECEMBER 9TH, 1896.

On this day came into open court William Grice and his sureties, E. Rotan, H. Behrens, and P. H. Dean, who jointly and severally acknowledged themselves to owe and stand indebted unto the United States of America in the full sum of one thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following:

Whereas the said William Grice complained to this court that he was unlawfully restrained from his liberty by Jno. W. Baker, sheriff of McLennan county, Texas, and was granted a writ of *habeas corpus*, which is set down for hearing on the 12th day of December, A. D. 1896:

Now, the condition of this obligation is such that if the said William Grice shall well and truly personally appear before this
92 court on the 12th day of December, A. D. 1896, at 10 o'clock a. m., and not depart from the court without leave thereof, and in all things abide the decision of this court on his said application, then this obligation to be void; otherwise to remain in full force and effect.

And thereafter the following further proceedings were had, to wit:

No. 655. *Ex Parte* WILLIAM GRICE.

DECEMBER 11TH, 1896.

Ordered by the court, on motion of respondent, that this cause be, and the same is hereby, transferred to the branch of this court held at Dallas for trial, and the same is set down for hearing on the first day of the next term of said court at Dallas, it being the 11th day of January, A. D. 1897, and the clerk is ordered to transmit to said court at Dallas all the original papers in this cause and a certified copy of all orders entered herein.

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct copy of all orders entered in said court at Waco, Texas, in cause numbered 655, *Ex parte* William Grice, as fully as the same appears from the records of said court in the clerk's office at Waco, Texas.

In testimony whereof I have hereunto affixed the seal of said court, at Waco, Texas, and sign the name of the clerk, on this the 16th day of December, 1896.

J. H. FINKS, *Clerk*,
[SEAL.] By C. A. RICHARDSON, *Deputy*.

The foregoing has the following endorsement, to wit:
Filed Dec. 18, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

93 *Amended Return of Jno. W. Baker, Sheriff, and Exhibits.*

In the United States Circuit Court for the Northern District of Texas, at Dallas.

No. 2062. *Ex Parte* WM. GRICE.

To the honorable judge of said court:

Now comes John W. Baker, respondent in the writ of *habeas corpus* issued in the above styled and numbered case, and, by leave of the court obtained, files this his amended return in lieu of his return filed December 9th, 1896, and says—

In obedience to the writ of *habeas corpus* issued in the above styled and numbered cause — day served upon me by the United States marshal for the northern district of Texas, at 3.30 p. m. Dec. 9th, 1896, I forthwith produced in open court, as directed by said writ, the body of said William Grice, and do further certify that I hold the said William Grice in my custody by virtue of a capias issued out of the district court of the 54th judicial district of the State of Texas upon an indictment preferred in said court against said William Grice and others in a certain criminal case numbered and entitled as follows, to wit: No. 871, The State of Texas *vs.* John D. Rockefeller *et al.*, said Grice being charged in said indictment, with others, with having engaged in a conspiracy against trade, in violation of an act of the legislature of the State of Texas entitled "An act to define

trusts, and to provide the penalties and punishment of corporations, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889; and, responding further, I would respectfully show to the court that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties toward this relator and his codefendants.

(1.) That said authorities have been anxious and ready to
94 accord all the defendants under the indictment heretofore mentioned that speedy trial which they were guaranteed under the constitution and laws of the State of Texas; that the delay in the determination of the indictment against them has come in a great part of their own seeking and by virtue of their own acts; that the call docket of the district court records of the 54th judicial district of the State of Texas, where said indictment is pending, shows that at the first term of said court, after said indictment was presented, said cause was set down for trial on March 14th; that upon the call of said docket for trial it was continued by agreement between the State and the defendants; that at the succeeding September term the case was set down for trial on October 4th, but, on the call of same for trial on that day, was continued, upon motion of the defendants; that it was again set down for the November term, to be tried on the 2nd day of December, 1895; that when the cause was called the defendants, including relator, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, and thereby avoiding and defeating a trial of relator herein.

For a verification of all of the foregoing statements I respectfully refer the court to the certified copy of the record of said 54th judicial district of the State of Texas, marked Exhibit "A," attached hereto and made a part hereof.

Answering further, respondent is informed and believes, and so charges, that the avowed purpose of the relator and his codefendants is to delay, and, if possible, to defeat, the jurisdiction of the courts of Texas in the administration of its laws, which he and his codefendants are charged with having violated; that, in pursuance of this purpose, this relator and his codefendants have plotted and concocted a set of facts and circumstances for the express object of appealing to that judicial discretion lodged in this court for granting writs of *habeas corpus;* that this relator and his codefendants have conspired among themselves to have their several sureties surrender them into my lawful custody as sheriff of McLennan county, Texas; that by their own acts and at their own request and by their own procurement the sureties of relator and his codefendants did surrender them, and on the very day of the sur-
95 render of this relator, contemporaneously with the surrender, in obedience to the petition of relator, a writ of *habeas corpus* issuing out of this honorable court was served upon me as sheriff of McLennan county, commanding me to produce before the court instanter the body of relator, held in my lawful custody.

For verification of which facts reference is made to the attached

affidavits of the sureties of relator and his codefendants, marked Exhibit "B" and attached hereto and made a part hereof, by agreement with counsel of relator, in lieu of the evidence of said sureties before this court.

Wherefore respondent prays that William Grice, relator herein, be remanded to my lawful custody, as sheriff of McLennan county, to await the action of the authorities of the State of Texas on the indictment pending against him for violation of its penal laws.

Given under my hand officially, at Waco, Texas, this 9th day of January, 1897.

J. W. BAKER,
Sheriff McLennan County, Texas.

96 EXHIBIT "A."

THE STATE OF TEXAS, }
County of McLennan. }

I, John H. Sears, clerk of the district court within and for said county and State of Texas, do hereby certify that in No. 871, The State of Texas *vs.* Jno. D. Rockefeller *et al.*, violation of anti-trust law, filed Nov. 21, 1894, the following is a true and correct copy of the original entries made upon State docket, district court, 54th judicial district, the same being used by the judge thereof for the docketing of criminal cases and the noting of settings, continuances, motions, and other orders. For the March term, 1895, the following is a true and correct copy of the original entry made by the district judge:

Set for May 14th; continued by consent.

For the Sept. term, 1895, the following is a true and correct copy of the original entry made by the district judge:

October 4th, continued by defendants and cause set for Dec. 2nd.

For the Nov. term, 1895, the following is a true and correct copy of the original entry made by the district judge:

Dec. 2nd, defendants sever *and* E. T. Hathaway upon trial first.

For the March term, 1896, the following is a true and — copy:

"Appealed as to Hathaway."

For the September term, 1896, the following is a true and correct copy:

"Passed."

For the November term, 1896, the following is a true and correct copy of the original entry:

December the 7th, this cause dismissed as to defendant E. T. Hathaway by county attorney.

In witness whereof I set my seal of office, at office, in Waco, this the 9th day of January, A. D. 1897.

JNO. H. SEARS,
Clerk D. C., McL. Co., Tex.,
By R. V. McCLANE, *D'y.*

97 EXHIBIT "B."

THE STATE OF TEXAS, }
County of McLennan, }

Before me, the undersigned authority, on this day personally appeared Charles Banister, who, being by me duly sworn, on oath says—

That on the — day of November, 1894, I became a surety for William Grice and F. A. Austin and Arthur M. Finley, defendants in cause # 871, styled The State of Texas *vs.* John D. Rockefeller *et al.*, pending in the 54th judicial district, McLennan county, Texas; that I continued as surety for their appearance from term to term until December 9th, 1896; that on that day D. C. Bolinger, Esq., one of the attorneys for the defendants, came to me and said that, as I was a surety for Messrs. Grice and Austin, he wanted me to surrender them to the sheriff on that day; that by his request I went to the office of Clark & Bolinger, when I met Messrs. Grice and Austin, and accompanies them to the office of the sheriff, where I surrendered them at about 2.30 p. m., December 9th, 1896, to John W. Baker, sheriff of McLennan county, Texas.

That in the forenoon of December 12th, 1896, W. E. Hawkins, one of the defendants in the above numbered and styled cause, came to me, at my place of business, and requested that I go to the office of Clark and Bolinger for the purpose of surrendering Arthur M. Finley, then in the office; that I accompanied Mr. Finley to the sheriff's office, where, at the request of Messrs. Clark & Bolinger, I surrendered Mr. Finley, and where, at the same time, Mr. N. S. Hill, a surety for W. E. Hawkins, surrendered said Hawkins, all in the morning of December 12th, 1896.

CHARLES BANISTER.

Subscribed and sworn to before me this 9th day of Jan'y, 1897, at my office, in Waco, Texas.

JAMES I. MOORE,
[SEAL.] *Notary Public of McLennan County, Tex.*

98 EXHIBIT "B."

STATE OF TEXAS, }
County of McLennan. }

Before me, the undersigned authority, this day personally appeared N. S. Hill, who, being by me duly sworn, on oath says—

That he was formerly a surety on the recognizance of W. E. Hawkins in cause No. 871, State of Texas *vs.* Rockefeller *et al.*, 54th judicial district; that I continued as surety for a period of two years, until about the 19th day of December, 1896; that on said day said Hawkins came in person to me and stated that his case was to be removed to the Federal court, and that he wanted me to surrender

him into the custody of the sheriff of McLennan county; that at his request I made the surrender on that day.

N. S. HILL.

Sworn to and subscribed before me, at Waco, Texas, Jan'y 9th, 1897.

CULLEN F. THOMAS,
[SEAL.] *Notary Public, McLennan County, Texas.*

The foregoing has the following endorsement, to wit:
U. S. circuit ct., northern dist. of Texas, at Dallas. *Ex parte* William Grice. Amended return of John W. Baker, sheriff of McLennan Co., Tex. No. 2062. Filed Jan'y 11, 1897. J. H. Finks, clerk, by Chas. H. Leduum, deputy.

99 *Replication.*

In the United States Circuit Court for the Northern District of Texas, at Dallas.

No. 2062. *Ex Parte* WM. GRICE.

Now comes William Grice, relator in the above entitled and numbered cause, and, answering the amended return of the respondent, John W. Baker, sheriff, this day filed herein, to wit, January 11th, 1897, demurs to so much of said return as sets up or attempts to set up that the delay in the determination of the indictment against this relator has come in a great part from this relator's own seeking and by virtue of relator's own acts, in that said criminal cause No. 871, in the district court of the 54th judicial district, was continued once by the consent of the parties, and subsequently, as pretended to be shown by the docket entries of said docket of said court, was continued thereafter by this relator, because said facts are wholly immaterial and irrelevant, there being no complaint on the part of this relator of any delay in the trial of said indictment in said district court of McLennan county prior to the conviction of this relator's codefendant, Hathaway, which occurred in December, 1895.

2. Relator further demurs to that portion of the return which avers that this relator, in conjunction with his codefendants in said cause, have conspired and concocted facts and circumstances for the express object of involving the judicial discretion of this court for granting a writ of *habeas corpus*, and he and his codefendants have conspired among themselves to have their several sureties surrender them into the hands and custody of the sheriff of McLennan county, Texas, because such facts, if true, do not constitute any justification of the detention of this relator and furnishes no answer to the allegations of the petition of this relator.

Wherefore and because of the fact that such amended return is required by law only to certify to this court the true cause of the

detention of this relator, such allegations — are herein de-
100 murred to are no answer to the issues before this court and are not sufficient in law; of all of which this relator prays the judgment of the court.

Further answering said return, this relator denies that he and his codefendant and counsel herein have conspired and confederated, as charged in said amended return of the respondent, for the purpose of defeating the jurisdiction of the courts of Texas and the administration of its laws. This relator says that for two years this relator and his codefendants have submitted to the jurisdiction of the courts of Texas for the purpose of trial as aforesaid, and when it became evident to this relator and his codefendants or co-relators herein that such trial was not to be had except at some indefinite period in the future, if ever, then this relator as a citizen of the United States proceeded to exercise his rights as such citizen and to call upon the courts of the United States to vindicate his rights, as he was entitled under the Constitution and laws of the United States and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purpose as indicated.

All of which this defendant is ready to verify.

JNO. D. JOHNSON,
CLARK & BOLINGER,
Attorneys for Relator.

UNITED STATES OF AMERICA, }
Northern District of Texas. }

I, Wm. Grice, relator, comes and says that the facts stated in the above and foregoing replication are true to the best of my knowledge, information, and belief.

WM. GRICE.

Sworn to and subscribed before me on this the 11th day of January, A. D. 1897.

J. H. FINKS, *Clerk*,
[SEAL.] By CHAS. H. LEDNUM, *Deputy.*

The foregoing has the following endorsement, to wit:
No. 2062. *Ex parte* Wm. Grice. Replication. Filed Jan. 11, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

101 *Agricultural Products and Their Value Produced in Texas in the Year* 1894.

Products.	No. of bales, bushels, &c.	Value.	Page of report.
Cotton	2,592,855 bales	$60,862,948 12	
Cotton seed	1,296,397 tons	8,102,481 25	186
Corn	63,184,450 bushels	29,111,640 84	188
Wheat	5,837,176 bushels	2,728,299 58	190
Oats	18,206,718 bushels	5,401,508 95	192
Barley	78,799 bushels	38,012 70	194
Rye	25,132 bushels	15,512 50	195
Rice	103,794 bushels	99,302 00	196
Sweet potatoes	4,983,796 bushels	2,316,598 72	197
Irish potatoes	557,794 bushels	389,797 60	199
Peas	385,140 bushels	399,746 00	201
Beans	28,780 bushels	40,944 95	203
Millet	89,195 tons	632,675 75	205
Sugar	94,456 barrels	1,099,402 00	208
Molasses	4,158 barrels	59,585 00	208
Sorghum syrup	38,425 barrels		
Sorghum forage	306,792 tons	1,934,537 37	212
Hay, cultivated	128,584 tons	1,100,321 50	214
Hay, prairie	189,280 tons	1,140,584 87	215
Peanuts	23,367 bushels	26,772 00	216
Tobacco	68,549 pounds	13,627 00	216
Pecans	42,608 bushels	62,844 00	216
Melons		483,522 75	218
Garden crop		2,194,887 00	220
Apples		148,285 00	222
Peaches		685,956 00	223
Pears		96,123 00	225
Plums		36,817 50	227
Grapes		196,978 20	229
Honey	2,273,515 pounds	210,007 66	230
Wool	11,557,258 pounds	810,566 66	236
		$120,410,286 47	

102 *Texas.*

Occupation.	Total.	Males.	Females.
Farmers, planters, and overseers	279,351	263,548	15,803
Agricultural laborers	129,553	111,469	18,084
Stock raisers, herders, and drovers	17,819	17,626	193
Laborers (not specified)	43,326	41,448	1,878
	470,049	434,091	35,958

103 DEPARTMENT OF THE INTERIOR,
CENSUS DIVISION,
WASHINGTON, *Nov.* 30, 1896.

Pursuant to section 882 of the Revised Statutes of the United States, I, George S. Donnell, chief of Census division, Department of the Interior, do hereby certify that the paper hereto attached is a true statement of the number of farmers, planters, overseers, agri-

cultural laborers, stock raisers, herders, and drovers and laborers (not specified) in the State of Texas, according to the census returns for 1890.

GEO. S. DONNELL,
Chief of Census Division.

104 W. P. C. F. A.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *November* 30, 1896.

Be it remembered that George S. Donnell, whose name is signed to the annexed certificate, was at the date of signing thereof chief of Census division, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be [SEAL.] affixed the day and year first above written.

WM. H. MILLER,
Acting Secretary of the Interior.

105 In the United States Circuit Court for the Northern District of Texas, at Dallas.

In Re WILLIAM GRICE.

Petition for Writ of Habeas Corpus.

Before Charles Swayne, district judge of the northern district of Florida, sitting by special designation in northern district of Texas.

CHARLES SWAYNE, *District Judge:*

This petition filed by leave of the court on Dec. 9, 1896, at Waco, in the northern district of Texas, and subsequently transferred to Dallas for hearing, and filed before Dec. 18, 1896, states—

That the petitioner, Wm. Grice, is a resident of the city and county of Dallas, State of Texas; that he is a citizen of the United States, and is unlawfully restrained of his liberty by John W. Baker, sheriff of McLennan county, Texas, by virtue of a capias issued out of the district court of the fifty-fourth judicial district of the State of Texas, at Waco, upon an indictment preferred in the said court against him and other citizens of the United States on the 21st day of November, 1894, No. 871, and entitled "The State of Texas *vs.* John D. Rockefeller and others." Said indictment charging that John D. Rockefeller, Henry M. Flagler, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Westley B. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruett, E. Wells, Wm. Grice, F. A. Austin and E. T. Hathaway, did unlawfully agree, combine, conspire, confederate and engage with Wm. B. Hawkins and divers other persons to the grand jurors unknown in McLen-

nan county, Texas, in a conspiracy against trade, with the said Wm. E. Hawkins, and said other persons, creating a trust, by the combination of their capital, skill and acts with the said Wm. E. Hawkins and other persons for the purpose, design and effect to create and car-y out restrictions in trade.

That said indictment and prosecution has for its exclusive and only basis a certain act of the legislature of the State of Texas, entitled, "An act to define trusts, and to provide penalties and punishment of corporations, firms and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, which act is a public law of the State of Texas.

That petitioner was arrested upon a capias issued under said indictment, and entered into recognizance for his appearance, and subsequently appeared on the 2d day of December, 1896, before the said court and said cause having been called for trial the defendants who had been arrested, announced a severance, and his codefendant, E. T. Hathaway, was then placed on trial, and by his counsel presented to said court his exceptions to the sufficiency of said indictment, and set up the following causes and exceptions to said indictment, to wit:

1. Because it did not appear from the face of the indictment that an offense against the law had been committed.

2. Because the indictment showed upon its face that the district court of the fifty-fourth judicial district had no jurisdiction.

3. Because the act hereinbefore recited was violative of the Constitution of the United States for the reason that said statute discriminated between different classes of citizens of the United States, and denied to certain citizens the equal protection of the law, and proposed to deprive certain citizens of the United States of their liberty, property, privileges, and immunities in a way other than by due course of the law of the land.

4. Because the act of March 30, 1889, was inoperative and void as to persons and citizens resident beyond the territorial limits of Texas.

5. Because said act did not prohibit a trust or declare it illegal, nor did it declare an offense or propose to punish it, but merely defined a trust without denouncing it, and was therefore not a penal law of the State of Texas, and no prosecution could be maintained under it.

6. Because said indictment showed upon its face that the parties presented were engaged in interstate commerce within the meaning of the Constitution and laws of the United States, and said court had no jurisdiction of any such matters.

Said district court overruled the above objections; the trial proceeded, and on the 12th day of December, 1895, resulted in a verdict of guilty of the said codefendant Hathaway, and assessed his punishment at a fine of $50, and judgment was duly entered thereon by the court.

That on the 14th day of December, 1895, said codefendant Hathaway filed his motions for new trial, and in arrest of judgment, set-

ting up among other things the error of the said court in overruling the exceptions above stated, which motion was overruled on Dec. 16, 1895, and said codefendant did thereupon prosecute his appeal to the court of criminal appeals of the said State of Texas, said last-named court having final jurisdiction of criminal matters in Texas, and being a court of last resort in said State, to hear and determine the questions therein raised; that under the provisions of the Code of Criminal Procedure of the State of Texas, and the act aforesaid, of 1889, said conviction was a felony, and the said Hathaway was subjected to confinement in the common jail of McLennan county, Texas, pending the determination of said appeal.

The petition further avers that the appeal of the said codefendant Hathaway was filed in the said court of criminal appeals at Dallas, on or about the 10th day of January, 1896, and on or about the 29th day of the same month, said appeal was argued by counsel, both for himself as appellant and counsel for the State, and was submitted to the said court for determination.

That upon the 24th day of June, 1896, said court of criminal appeals handed down its decision in said cause, wherein it declined or refused to pass upon the exceptions to the sufficiency of the indictment aforesaid, which had been duly raised in the court below, and duly presented to said court by assignment of errors, and by argument, and which involved the dearest rights, not only of the said codefendant, Hathaway, who was appellant therein, but of this petitioner, and which appeal called for an adjudication by said court of criminal appeals of the said State of Texas, upon said rights.

That the said court of criminal appeals decided said appeal upon a technical ground of the pleadings, holding in effect that because the indictment presented in said cause had failed to charge the appellant, Hathaway, with having "knowingly carried out as agent the stipulations, purposes, prices, rates or orders," under said alleged conspiracy, that thereafter, the admission of evidence to that effect over the objection of said Hathaway was unwarranted in law and said conviction was invalid, and thereupon for said cause, and without considering and determining the rights of said appellant, Hathaway, as a citizen of the United States under the Constitution, said court reversed said judgment and remanded said cause for trial *de novo* to said district court.

That since the rendition of said judgment by said court of criminal appeals, two terms of the said district court have been held, one of which is now nearing its close; that this petitioner with his codefendants have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said cause has not been even called by the court for trial, nor has said cause been set for trial, but same has been permitted to remain on the docket of said court, subjecting this petitioner and his codefendants, not only to the shame and contumely of an indictment for felony, but denying him and his codefendants the right to be heard as a citizen of the United States, and whereby this petitioner, as well as his codefendants, are without remedy in the State courts

of Texas, for the assertion and vindication of their rights under the Constitution of the United States.

And petitioner further states that on the 24th day of November, 1896, said codefendant, E. T. Hathaway, procured from this court his writ of *habeas corpus*, commanding said John W. Baker, sheriff of McLennan county, to produce before it the body of said Hathaway, and certify to the cause of his detention, which writ was, on the same day, duly served on the said sheriff, who made return that he held said Hathaway by virtue of a capias issued under the indictment hereinbefore mentioned.

Said cause was set for hearing on the 7th day of December, 1896, at Waco, Tex., and due notice thereof given to the State; that said writ was based exclusively upon the ground that he was a citizen of the United States, and that the law under which said indictment had been presented was violative of the Constitution of the United States in the particulars stated in his exceptions thereto filed upon the trial of the said cause.

That petitioner further shows that the prosecuting officer of the State of Texas is in the district aforesaid, as petitioner believes, for the purpose of defeating the jurisdiction of the Federal court upon the said writ, and for the purpose of preventing this court from passing upon the constitutionality of the rights of the said E. T. Hathaway as a citizen of the United States, did, on the 7th day of December, 1896, in said district court, and with the consent of said court, dismiss said indictment and prosecution as to said E. T. Hathaway, codefendant, but left same to stand unimpaired and unaffected as to this defendant and his other codefendants, and upon the same day the said sheriff did file his amended return to said writ, wherein he submitted to this court a copy of said judgment of dismissal of the said district court of the State of Texas, and did further certify that by reason of said dismissal he claimed no further right and custody of the said Hathaway, and by reason thereof the jurisdiction of this court in the premises was practically and substantially terminated, and this court was denied the privilege of determining whether or not said act of the legislature of the State of Texas, approved March 30, 1889, commonly known as the "anti-trust act," was, or was not, violative of the Constitution of the United States, and violative of the rights, privileges and immunities of your petitioner, as well as his codefendants.

The petition further avers that said act is violative of the Constitution of the United States, and is therefore null and of no effect, for the reasons stated in said exceptions to said indictment hereinbefore recited; that said act discriminates between different classes of citizens of the United States, and denies to certain citizens the equal protection of the laws; that it deprives certain citizens and classes of citizens of the United States of their liberty, property, privileges and immunities in a way other than by due course of the law of the land; that it otherwise attempts to justify the exercise of extraterritorial jurisdiction over the citizens of the United States residing in other States of the American Union, and over acts done in other States of the American Union, and over which the State of Texas

can have no possible jurisdiction; and that said act and the indictment against your petitioner and others, as aforesaid, is an attempt to regulate and interfere with interstate commerce, all in violation of the Constitution of the United States.

The petitioner further shows that by rea- of the premises he is without remedy for the assertion and vindication of his rights as a citizen of the United States under the Constitution thereof; that he has stood under indictment for felony charged with the violation of said statute for a period of two years without being afforded an opportunity by the State courts of Texas for the assertion of his rights as aforesaid as a citizen of the United States. Your petitioner avers and believes that it is the purpose and intent of the prosecuting authorities of the State of Texas to prevent, if possible, any appeal by this petitioner to the courts of the United States for the vindication of his rights as aforesaid as a citizen. In view of the premises herein recited, and without the interposition of this honorable court for his due protection and the due conservation of his rights as a citizen of the United States, he is practically remediless by an appeal in regular course or otherwise.

Upon the said premises the petitioner prays this court for its writ of *habeas corpus*, to the end that the cause of the detention of the petitioner may be promptly and summarily inquired into by this court according to the laws of the United States, in order to direct the discharge of this petitioner from the custody of said Baker, sheriff, as aforesaid.

The petitioner filed with his petition his exhibits, as follows:

1. Copy of indictment preferred in said cause against your petitioner and others.

2. Copy of judgment of the district court of the fifty-fourth judicial district adjudging his codefendant, Hathaway, guilty.

3. A copy of the brief and argument of your petitioner's codefendant Hathaway in the court of criminal appeals of the State of Texas.

4. A copy of the opinion of the said court of criminal appeals of the State of Texas.

5. And petitioner refers to the record of this court in matter of the application of *ex parte* E. T. Hathaway, and prays that they may be considered a part and parcel of this petition. And your petitioner prays that these papers filed herewith may be read and considered by the court upon final hearing hereof, also as a part of this his petition for *habeas corpus*.

And as in duty bound your petitioner will ever pray.

Said petition was duly sworn to by the said petitioner, William Grice, upon the 9th day of December, 1896, in the presence of Thomas P. Stone, a notary public for McLennan county, Texas.

As to the papers filed with and made a part of this petition the indictment contains six counts, and covers every phase and feature of the said act under which it is drawn.

The judgment of the district court of the fifty-fourth judicial district of the State of Texas follows the verdict therein.

A copy of the brief and argument of petitioner Hathaway in the

court of criminal appeals of the State contains the usual matters embodied in such a brief, including the rulings of the trial judge, together with the opening argument of counsel for the State, made at the trial.

The copy of the opinion of the said court of criminal appeals of the state of Texas, showing that the court decided:

1. The judgment is reversed and the cause remanded because the court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict.

2. That the decision of the constitutional questions raised by appellant Hathaway was not necessary in that case.

3. That the presumption would be indulged that the decision of the supreme court of the State of Texas sustained the constitutionality of said act was correct.

4. The petition of E. T. Hathaway for *habeas corpus* and the return and amended return of the sheriff thereof shows substantially the facts as alleged above.

Upon said petitions and exhibits being filed, this court on Dec. 9, 1896, granted the writ of *habeas corpus* prayed for, which was duly served on the same day upon John W. Baker, sheriff of McLennan county, Texas, who upon the same day produced in open court as directed the said Wm. Grice, and answered that he held him in custody by virtue of a capias issued out of the district court of the fifty-fourth judicial district of the State of Texas upon an indictment No. 871, entitled "The State of Texas *vs.* John D. Rockefeller *et al.*" Said indictment charged said parties with having engaged in a conspiracy against trade in violation of the act of the legislature of the State of Texas, entitled "An act to define trusts," etc. On the 11th day of January, 1897, said sheriff of McLennan county filed his amended return herein, in which he set up in addition to the facts contained in his former return, that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their duties toward this relator and his codefendants, that they have been anxious and ready to accord them a speedy trial, and that the delay in the trial came in a great part from their own seeking, and that the docket entries of said court would show that the cause was continued twice at their special request before proceeding with the trial in December, 1895; and the amended answer further charges that it was the avowed purpose of the relator and his codefendants to delay and defeat the jurisdiction of the State courts in their case by having their sureties surrender them in
106 order that this writ of *habeas corpus* might be sued out. And said sheriff prays that the relator herein be remanded to his custody, to which amended answer, relator on the same day replied that the delay complained of in his trial was that which occurred subsequent to the 2d day of December, 1895, and denied the allegations that he and his codefendants had conspired to defeat the jurisdiction of the court of the State of Texas, and demurred to so much of said amended answer as referred to relator and his codefendants having procured their sureties to surrender them to the

sheriff, because such allegations, if true, are no justification of the detention of this relator, and furnish no answer to the allegations of his petition, and prays judgment therein.

At the hearing petitioner also filed in evidence the certificate of the Secretary of the Interior, by George S. Donald, chief of Census division of the United States, showing the number of farmers, planters, overseers and agricultural laborers, stock-raisers, herders and drovers, and other laborers not specified, within the State of Texas, according to the census returns of 1890.

Upon the said petition and exhibits, answer and amended answer, and replication thereto, hearing was had.

First, as to the petitioner's demurrer to plaintiff's plea that he was in the hands of the sheriff by collusion with his sureties at the time of the suing out of the writ of *habeas corpus*, the court thinks the demurrer should be sustained. While it was early decided in Republica *vs.* Arnold, 3 Yates, 263, Penn. Reports, that the law authorizing the issuance of a writ of *habeas corpus* did not apply to a person out on bail, and could not be directed to the bail of an offender, and in Wales *vs.* Whitney, 114 U. S., 564, that in order to make a case for *habeas corpus* there must be actual confinement or the present means of enforcing it; mere moral restraint not being sufficient; also in the case in 6 Martin, La., 569, and Rex *vs.* Kessel, First Burrow, 658, by Lord Mansfield, to the same effect; yet it has been held in Taylor *vs.* Taintor, 16 Wallace, 366, that when bail is given the principal is regarded as delivered to the custody of his sureties, and their dominion is a continuance of the original imprisonment; wherever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done; the seizure is not made by virtue of new process, none is needed; the bail have their principal on a string and may pull the string whenever they please to surrender him in their discharge.

In the case of Devine *vs.* The State (5 Sneed, 625), the court, speaking of the principal, says: "The sureties had the control of his person; they were bound to keep him within their jurisdiction, and have his person ready to surrender when demanded. Though beyond the jurisdiction of Connecticut, he was still in the hands of the law of that State, and held to answer there for the offense with which he was charged." But the petitioner here was in the custody of the officer; he so answers in his return, and his answer must be taken as true. The petitioner had the perfect right, when first arrested, to refuse to give bail; his sureties had an equal right to surrender him to the State after it was given, for any cause whatever, and it is not within the province of the respondent to question the purpose in either case. The court is of the opinion that he had the right to do either one or the other, for the purpose of testing the constitutionality of the law under a writ of *habeas corpus*, when all the facts of this case are considered.

The principal questions remain: First, the right of this court to take jurisdiction of this case; second, the constitutionality of the law. The court is not inclined to question the contention of the

principles laid down by the State as embodied in the decision cited by its representatives on the first point, to wit: That the general rule is that parties being prosecuted in State courts will not be released on writs of *habeas corpus*, but will be left to reach the Supreme Court of the United States by writ of error. This rule is abundantly sustained by numerous decisions cited, and is scarcely questioned by the relator himself. But it is equally as well established by the same references, that the Federal court has the power to do so, if special circumstances should require; that it possesses a discretion in the matter which must be governed by the facts in such case.

A brief review of a few of the cases cited will establish the above principle. In the leading case of *Ex parte* Royal (117 U. S., 241), Justice Harlan, speaking for the court, while refusing to reverse the exercise of the discretion of the circuit court, affirms the power of the Federal courts to issue writs of *habeas corpus* of prisoners held by the States, and on page 248 in that case, says: "The statute evidently contemplated that cases might arise when the power thus conferred should be exercised during the progress of the proceedings instituted against the petitioner in a State court, or by or under the authority of a State on account of the very matter presented for determination by the writ of *habeas corpus*." And on pages 249 and 250: "We are therefore of the opinion that the circuit court has jurisdiction upon writs of *habeas corpus* to inquire into the cause of the appellant's commitment, and to discharge him if he be held in violation of the Constitution," but adds: "As it does not appear that the circuit court might not in its discretion and consistently with the law and justice, have denied the applications for the writ at the time they were made, we are of the opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his application to the court at some future time, should the circumstances render it proper to do so."

In re Wood (140 U. S., 278) the court refuses to review the exercise of the discretion of the circuit court in refusing to grant a writ of *habeas corpus*, but affirms the doctrine of the authority to grant such writ.

In Cook *vs.* Hart (146 U. S., 183) the above doctrine is affirmed in the following language:

"We are unable to see in this case any such special circumstances as were suggested in the case of *Ex parte* Royal, as rendering it proper for a Federal court to interpose before the trial of the case in the State court. While the power to issue writs of *habeas corpus* to State courts, which are proceeding- in disregard of rights secured by the Constitution and laws of the United States, may exist, the practice of exercising such a power before the question has been raised or determined in the State courts, is one which ought not to be encouraged. Should such rights be denied his remedy in the Federal court will remain unimpaired."

Mr. Justice Jackson, speaking for the court *In re* Frederick (149 U. S. 73), says: "While the writ of *habeas corpus* is one of the rem-

edies for the enforcement of the right of personal freedom, it will not issue as a matter of course, and it should be cautiously used by the Federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense."

He affirms, however, the power of the Federal court to grant such writ in certain cases in advance of the trial, but says that that discretion should be subordinate to any special circumstances requiring immediate action. And when the State courts shall have finally acted upon the case the circuit court has still a discretion whether, under all the circumstances existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State or whether it will proceed by writ of *habeas corpus* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.

In New York *vs.* Eno (155 U. S. 90), it is decided that the United States should refuse to issue writ of *habeas corpus* unless it also appears that the case is one of urgency, when the claim of the accused of immunity from prosecution in the State court has been passed upon by the highest court of the State of New York in which it could be determined, he may then, if the final judgment of that court be adverse to him, invoke the jurisdiction of this court for his protection in respect to any Federal rights asserted by him, but this may be denied by such judgment.

In re Belt (159 U. S. 100), Chief Justice Fuller, speaking for the court, says: "Ordinarily the writ will not lie where there is a remedy by writ of error or appeal, but in rare and exceptional cases it may be issued, although such remedy exists."

In re Swann (150 U. S. 648), the same judge in delivering the opinion for the court, says: "We reiterate what has so often been said before, that the writ of *habeas corpus* cannot be used to perform the office of writ of error or appeal, but when no writ of error or appeal will lie, if a petitioner is imprisoned or under a judgment of the circuit court which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment complained of, then relief may be accorded," citing *In re* Fredrich (149 U. S. 70) and *In re* Tyler (149 U. S. 164).

The above cases not only establish the general rule insisted upon by the State, but also the exceptions thereto, and refute the argument made by the State that the only exceptions to that rule were stated in Whitten *vs.* Tomlinson, 160 U. S. 243.

It is insisted by the State that this is a case where the relator stands indicted in the ordinary way in the State court, and before trial in which his rights have not been determined, and that therefore, under the general rule referred to above in regard to the jurisdiction of the Federal court and the exercise of its jurisdiction, it will not take jurisdiction of the case.

What are the facts that this court is called upon to consider on this question of jurisdiction?

1. That the petitioner is indicted under this "anti-trust" law in

the same indictment with more than a dozen others, some of whom are charged with the commission of crimes in other States than that of Texas; that one of the petitioner's codefendants has been tried and convicted in the district court of the fifty-fourth judicial district of Texas, and appealed his case to the court of last resort in said State, raising the question of the constitutionality of the law and the jurisdiction of the State; that said court of last resort granted a new trial and remanded the codefendant for the reason that there had been no testimony offered to sustain a verdict of guilty, and while deciding it was unnecessary to pass upon the constitutional questions raised, referred favorably to decisions of the supreme court of the State, in which the anti-trust law had been mentioned in this regard. Said codefendant was held by the said district court for nearly six months before the State discovered that they had no evidence upon which to hold him longer, and said discovery was only made after the writ of *habeas corpus* had issued from this court, and the codefendant had been brought in for the purpose of having the question of the constitutionality of said law determined.

That since the trial of codefendant, Hathaway, in December, 1895, this petitioner has never been called for trial, nor given any chance to have his rights determined by said court; that the law in question makes an offense under it a felony, and prevents the petitioner from giving bond after conviction, and compels him to submit to incarceration during all the time required for an appeal to the criminal court of appeals, and from there to the Supreme Court of the United States should it become necessary. These facts, taken together with the rulings of the trial judge in the Hathaway case, as well as the argument of the counsel to the jury permitted therein for the State, constitute circumstances under which this court is called upon to exercise its discretion in assuming jurisdiction in a writ of *habeas corpus*.

While the facts that might be produced in the State court on the trial of petitioner might be entirely different from those that the State was able to offer at the trial of Hathaway, judging from the record of the evidence and the ruling of the court, and the wild harangue permitted by the State's representative to the jury in the name of argument, and the verdict that followed, this petitioner can expect little better results than Hathaway received in that court, yet the questions of law involved in the indictment and the rights of all his codefendants named therein, under the Constitution of the United States, must necessarily be the same. And while it is to be presumed by this court that in the first instance the State court will decide the questions properly and according to law, yet when this court has the evidence before it of the manner in which they have been decided in the Hathaway case, it is to be presumed that the same ruling would be given on the trial of this petitioner, especially when the ruling of the court of criminal appeals, in remanding the prisoner, referring favorably to the decision of the supreme court of the State affirming the constitutionality of the law, would seem to endorse that portion of the trial judge's ruling in this regard.

Petitioner makes no complaint of the delay occasioned by the State court of his trial prior to December, 1895, but alleges in his petition that he has had no opportunity since that time to have his case disposed of, which fact is not denied by the State. While the court of criminal appeals expressed it as unnecessary to pass upon the question of the constitutionality raised in the Hathaway appeal, yet in remanding Hathaway for a new trial under the circumstances, it practically and emphatically indorsed the constitutionality of said law, and that it might not be misunderstood, as to its views on the subject, referred with favor to the decisions of the supreme court of Texas, indorsing the law.

By the decision of the court of criminal appeals, they not only decided that there was no testimony to sustain the verdict against Hathaway, but intimate that the allegations of the indictment were not such as to admit the testimony, if it had been present. Under this suggestion, is it not strange that the State did not discover for six months that they possessed no testimony with which to convict him, and that discovery was not made until after the Federal court had granted its writ of *habeas corpus* and had the matter of the constitutionality of the anti-trust law set down for hearing? So far as the legal and constitutional questions are concerned, the trial of Hathaway, was the trial of this petitioner, and whatever rights he has under the Constitution of the United States under this indictment, have already been disposed of against him by the State in a court of last resort. But further than this it has been disposed of in the manner which not only prevents Hathaway from coming to this court to get his constitutional rights determined, but if the State's theory is correct it will prevent this petitioner and every other of his codefendants so held under bond, from getting any relief until they have submitted themselves to a trial and appeal to the court of criminal appeals with the certainty of having the constitutional questions determined against them, in the way that they have already been, and if there should appear evidence on which to hold them, then each of them must go to the Supreme Court of the United States pending a writ of error, and remain incarcerated in a jail of Texas during all this time whilst their rights are being thus determined.

The court has no better language in which to express its views of the State's contention herein than that given by Brewer, judge, in *Ex parte* Kieffer (40 Fed. Rep., 400) as follows:

"Therefore, it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the State courts. So it is argued that if it be true that these ordinances are in conflict with the Federal Constitution, the petitioner has his remedy. He can appeal his case from the police to the district courts; from there to the supreme court of the State, and thence to the Supreme Court of the United States. While that is true, yet he has no adequate relief in that way. He is now under sentence and he cannot appeal without bond. He will be subjected to trial in the district
107 court, possibly to an inquiry in the supreme court of the State and finally in the Supreme Court of the United States.

He must bear the expense and suffer the delay. This is not a case prior to trial and judgment. It is a case after trial and after judgment. He has experimented with the State court and it has decided against him. While he has, of course, the right to appeal, yet this is a burden, and personally to him, it is an adequate protection to say: 'You can appeal and go through that channel to the Supreme Court of the United States.'

"But this is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce, and prevent the free exchange of commodities between citizens of another State and those of this city. Few persons can stand the expense of litigation running through that channel to the Supreme Court. Length of time would pass before the judgment of that court could be obtained. In the meantime, if these ordinances are enforced—not only against this petitioner, but against whoever may see fit to engage in this business—there is an interference with exchange of commodities between the citizens of other States and those of this city; and the result would be to stop such traffic. Now, when that would be the natural result, when that is declared to be the intended purpose of this legislation, this court may, in the exercise of its discretion, properly hold, after a case has passed to judgment in the State court, that the party has a right to a speedy inquiry and determination in the Federal court as to whether such ordinances are in conflict with the Constitution of the United States. The public, as well as the individual, are interested in a speedy settlement of this matter."

The act in question of March 30, 1889, of the State of Texas, is as follows:

1. "A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade; second, to limit or reduce the production or increase the price of merchandise or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use or consumption in this State; fifth, to make or enter into or carry out or execute any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity or article of trade, use, merchandise, commerce or consumption below common, standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between themselves or preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or by which they shall agree to pool, combine or unite any interest that

they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

2. Any violation of either or all of the provisions of this act shall be, and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders thereunder, or in pursuance thereof, shall be punished by fine, not less than $50 nor more than $5,000, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision, shall constitute a separate offense.

3. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with, or in pursuance of it, without giving its name or description, or how, when or where it was created.

4. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it or acted for, or in connection with it, without proving all the members belonged to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged, may be established by proof of its general reputation as such.

5. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offences enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State.

6. Each and every firm, person, corporation, or association of persons, who shall, in any manner, violate any of the provisions of this act, shall, for each and every day that such violation be committed or continued, forfeit and pay the sum of $50, which may be recovered in the name of the State of Texas, in any county where the offense is committed, or where either of the offenders reside, or in Travis county. And it shall be the duty of the attorney general or the district attorney, to prosecute for and recover the same.

7. The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

8. The provision- of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

That portion of the fourteenth amendment of the Constitution of the United States referred to in the argument, is the latter part of section first, and is as follows:

"No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

While the objection of the petitioner to the act in question that it is invalid and inoperative as a penal enactment by reason of its failure to prohibit trusts and declare them illegal, and because of the further failure of said act to declare or propose any punishment, may be well taken in that strict construction required for criminal statutes, yet this objection, if good, can readily be remedied by the legislature, and the supreme court of the State have in some of their decisions read into it the intention of the legislature to complete its meaning. It were perhaps better to pass this objection, without further comment, in view of the fact that it is not the vital constitutional question before the court.

The fifth paragraph of the said act, in which it is attempted to claim jurisdiction for offenses committed outside the State of Texas, is so absurd that a denial thereof is scarcely necessary.

It has been decided in emphatic language by Chief Justice Taney in United States *vs.* Booth, 21 Howard, 524, as follows: "No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." This principle is elementary, and not only common law, but the commonest of common sense.

It has been properly suggested that should this feature of this act be carried out and administered it would be unnecessary for any other State or nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and in the conduct of their business according to the wishes of the legislature of Texas. The State in its criminal jurisdiction as to acts committed within its own boundaries, and within the limits prescribed by the Federal Constitution, is sovereign, and its process should not be interfered with where it does not contravene the said Constitution, but beyond the boundaries of the State it has no more authority in New York, Missouri or Ohio than it has in Great Britain or Austria, and that part of the act which proposes this extraterritorial jurisdiction is absolutely null and void.

But under some of the decisions we think it may properly be contended that paragraph 5 of this act can be omitted as unconstitutional without affecting the remainder.

The vital question and the most important one in this case remains: Whether or not the said act violates that portion of the fourteenth amendment to the Constitution of the United States above referred to, in that it deprives its citizens of liberty and property without due process of law; and second, it denies to a considerable number of its citizens the equal protection of the law.

This is not a question of the right of taxation, nor is it a question of police power of the State to suppress or regulate nuisances

or to control the liquor traffic, foreign or domestic. But the two plain questions squarely raised are, first, can the State of Texas prohibit all contracts of whatever character or nature among its citizens when they tend to contravene the intended prohibition of the act, and second, if they can do so, is it class legislation to exempt 80 per cent. of the whole population from the pains and penalties of the said act when dealing with the agricultural products or live stock in the hand of the producer or raiser? These are the two vital questions involved in this case.

In regard to the first proposition, the complainant contends that the act is violative of the fourteenth amendment to the Constitution of the United States, because it denies to citizens of the United States the right to make valid contracts with respect to their business and property, and deprives them of the right of their property in that respect, as well as liberty, without due process of law.

Some difficulty has been expressed by courts in finding the exact and specific definition of the expressions "due process of law" and the "law of the land." The Constitution itself declares: "The Constitution and laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The Supreme Court in speaking of "due process of law" and "equality of citizens," said that the purpose of the requirement is to exclude everything that is arbitrary affecting the rights of citizens. (129 U. S., 124.)

Says the court in Live Stock Association *vs.* Crescent City, etc., 1 Abb., United States Report-, 399: "No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful and industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. There is no more sacred right to the citizenship than the right to pursue any lawful employment in a lawful manner; it is nothing more nor less than the sacred right of labor." The same sentiment is affirmed in the Slaughter-house case, 16 Wallace, 36, and other decisions.

It is not necessary to argue that the constitutional privileges which protect the citizen in his life, liberty, & property, entitle him to raise, produce, — manufacture articles of general use, buy and sell, to fix and limit the amount of any article which he will produce or manufacture, to increase or reduce the amount so produced or manufactured at his own will, within the limits of his ability; to fix and limit the price at which he will buy and sell, to bargain and agree with others upon prices, so far as it may be necessary in the business of buying and selling; in fact, to do anything and enter into all contracts usual and necessary in the ordinary avocations of production, manufacture and trade.

Neither the State nor the national legislature possess any right to limit these natural privileges of contracting or conducting business. Any law which undertakes to abolish these rights, the exer-

cise of which does not involve infringements upon the rights of others, or to limit the exercise thereof beyond what is necessary, to provide for the public welfare and general security, cannot be included in the police power of the Government.

"The right of liberty embraces the right of man to exercise his faculties and follow any lawful avocation for the support of life." (Berthoff *vs.* O'Reilly, 74 N. Y., 515.)

Liberty in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. (People *vs.* Marx, 99 N. Y., 377; People *vs.* Gillson, 109 N. Y., 389.)

"The legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts not concerning the health, safety or welfare of society, and the courts may examine into, and annul such illegal legislation." (J. W. & W. Co. *vs.* Jacksonville, 67 Illinois, 37; Ieck *vs.* Anderson, 57 Cal., 251.)

"Whenever the prosecution of a particular calling threatens damage to the public or to other individuals it is a legislative subject for police regulation to the extent or preventing the evil, but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation." (Lakeview *vs.* Rosehill Cemetery, 70 Ills., 192.)

"It is also a judicial question whether police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public."

One of the most sacred rights of liberty is the right of contract. All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the Constitution and are not capable of being restrained by legislative action. Among these rights is that of forming business relations between man and man. A man may form business relations with whom he pleases, and in the conduct of such business they may fix and limit the character and amount of their business, the price they will charge for the produce which they offer to the public, or about which they contract. It is part of the natural and civil liberty to form business relations free from the dictation of the State; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract, which constitutes the basis of business relations or transactions. It is, therefore, the general rule that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay." (Tiedman's Limitations of Police Power, pp. 333)

108 And on page 244 he says: "A man has a constitutional right to buy anything in any quantityty, provided he uses only fair means and set his own price on it, or refuse to sell it at all. And what one man may lawfully do as an individual, two or more may also do when combined as partners. Combination for business purposes is legal. Combinations are beneficial as well as

injurious, according to the motives and aims with which they are formed. It is, therefore, impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the object of the combination."

"If there is one thing more than another public policy requires, it is that men of full age and competent understanding, shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." (Print Co. *vs.* Sampson, 10 Eq. Cases, 452; Match Co. *vs.* Roeber, 106 N. Y., 473; U. S. Chemical Co. *vs.* Provident Chemical Co., 64 Fed. Rep., 946)

From the title of the act "conspiracies against trade," and "trusts" as well as from the argument for the State, it would seem to be the impression that the act was intended only to prevent oppressive and unreasonable combinations. There is no such limit, however, within its four corners. It embraces the combination of two or more persons, consequently the partnership of two persons. Neither is there any limitation to the amount of capital combined with skill and acts. A small capital with a minimum of skill is as much prohibited as the largest amount. We are not permitted to read any such explanation into it, but must take it as the legislature furnished it, and with such construction as the rules of law put upon it. The courts have no more power to exclude what it embraced in it than to include what is not contained in the plain language of the act. Then it is declared that the prohibited combinations must be for one or more certain specified purposes as follows:

To create or carry out restrictions in trade; to limit or reduce the production of commodities; to increase the price of commodities; to reduce the price of commodities: to prevent competition in the manufacture, sale, etc.; to fix the price of any article at a standard or figure, whereby its price to the public shall be in any manner controlled or established.

It makes criminal the making or carrying out of any contract, obligation or agreement, by which two or more persons, firms or corporations combine themselves not to sell any article below a standard or common figure; to keep the price of such article at a fixed or graduated price; to settle the price of any article between themselves and others to exclude all free unrestricted competition among themselves and others; to pool, combine or unite any interest they may have in connection with the sale and transportation of any article when its price might in any manner be affected.

An agreement between two or more persons forms a combination between them. An agreement between two or more persons is made as criminal as an agreement between 100. No attempt is made to condemn only acts which are oppressive by reason of their magnitude; it is evident that it is made criminal for two persons to combine as partners, corporators or otherwise in the ordinary business of life, to increase or reduce the price of commodities or fix the standard thereof. Next it is also made criminal for two persons to

agree to limit or reduce the production of commodities; it is made criminal for two persons to combine for the purpose of limiting competition, or to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between them or themselves and others; it is made criminal for two persons to create or carry out restrictions in trade.

We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production and the price at which they can sell their commodities. Having determined as near as possible the costs of their manufactured products and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price up or down as the cost of production may vary, finding after a time their prices too high and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be after a time an increase in wages and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable and they agree to limit or reduce the production of their commodities. All this they must be able to do or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves and others and bind themselves to sell their commodities at a figure or graduated figure, and not to sell below a common-standard figure, or if they cannot carry on business without raising and lowering prices and increasing and diminishing their productions at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purpose is not of the slightest consequence.

The right to combine, to form partnerships and joint stock associations, the right to agree as to prices and production, the right to fix prices, to raise and lower them as business may require, is not oppressive to the public nor unjust to the individual, nor contrary to public policy. It is an essential right as part of the liberty of the citizen, of which no legislature can deprive him.

If an ordinary business partnership is rendered criminal by the act, no further argument is necessary. That it is so most clearly appears from the concluding portion of section 1, by which two or more persons are forbidden to unite any interests that they may have in connection with the sale or transportation of any article or commodity that its price might in any manner be affected. Two

village grocers doing business at a loss to both could not form a partnership in order to save both from bankruptcy. Neither could they form a partnership in order that they might lessen their expenses and thus reduce the price of their commodities to the public. Still more. If A and B, each owning half a car-load of potatoes, should agree to ship together in order to obtain car-load rates, thus enabling them to sell lower in the markets, they would violate this act.

Not only under this act is it impossible for citizens to enter into the simplest partnership without violating it, bu- they cannot enter into a joint stock association or corporation, for that precludes competition between those combined. And this forms so necessary a part of the daily business of men that their prohibition would interfere with and prevent business as now conducted, and consequently to make that criminal is to interfere with the liberties of the citizen.

The statute books contain laws authorizing and legalizing associations and corporations. Can it be that the same statute book which contains such laws can contain also a valid law inflicting severe penalties on those who do only that which the laws have authorized?

The act also prohibits combinations which create or carry out restrictions in trade. It has never been held that all restrictions in trade were illegal or contrary to public policy. The rule is well settled that when a contract is publicly oppressive and the restrictions broader than necessary for the legitimate protection of the other party to be benefited by the contract, then the contract is void; otherwise, it is legal.

The fault of the act in regard to restraint of trade is the same in regard to competition; it makes no distinction between legal and illegal combinations and agreements which prevent competition. These, which have always been held legal, and which have always been an essential part of the liberty of the citizen, are made criminal equally with those which the law has always condemned.

A few *citizens* showing the law as established by the Federal courts as compared with the Texas act, may be instructive in this connection:

The case of The United States *vs.* The Trans-Missouri Freight Association, will bear careful perusal in this connection. The opinion of Riner, D. J., is reported in 53 Fed. Rep., 441, and of Sanborn, C. J., in 58 Fed. Rep., 53. The argument in these opinions is to demonstrate that contracts which restrict competition, are not necessarily in restraint of trade, and therefore, not embraced in the Federal act. The same arguments conclusively demonstrate that any law preventing all contracts which prevent competition, are infringements of the liberty of the citizen.

After reviewing the case which apparently condemns restriction of competition, Judge Sanborn says (page 70):

"But in none of thes- cases were they required to hold, and in none of them did they hold, as we understand the opinions, when

read, in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

The learned judge then cites a score of cases in which contracts in restriction of competition are held to be illegal, and sustaining his opinion, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction that is the test of the validity of the contracts that are claimed to be in restraint of trade."

This case is followed in Dueber Manufacturing Company *vs.* Howard Watch Company (66 Fed. Rep., 637).

"Excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable, and are condemned as against public policy."

Also Leslie *vs.* Lorrillard (110 N. Y., 519), in which the court says:

"It does not think that competition — invariably a public benefaction, for it may be carried on to such a degree as to be an evil.

"It is perfectly legitimate to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade."

If this right to combine exists, the right to do ordinary business, such as fixing prices, changing prices, agreeing on productions, etc., must follow, and all these things constitute the liberty of the citizen.

The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which reasonably restrict competition; it condemns any agreement or arrangement which prevents competition, between two or more persons entering into it. It not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices; it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The legislature perhaps had in mind that which might possibly be a means of public oppression, to wit: the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not so discriminate, because of the want of ordinary care in studying the meaning of words, that we have on the statute books of Texas at the close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalleled in the world's history, an act making it a highly penal

offense for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell.

The next question is, Does this act of March 30, 1889, deprive any citizen or class of citizens of the equal protection of the law?

The fourteenth amendment of the Constitution in declaring that no State shall deny to any person within its jurisdiction the equal protection of the law imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property.

Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws, and by "equal protection of the laws" is meant equal security under them to every one under similar terms—in his life, his liberty, his property and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances.

This subject of equality before the law is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, State and Federal, but the principle has been guarded by the courts with jealous watchfulness, to see that the citizen may have guaranteed to him this inestimable privilege and condition. (Barber *vs.* Conley, 113 U. S., 27; Yick Wo *vs.* Hopkins, 118 U. S., 356; Bent *vs.* West Virginia, 129 U. S., 114; *Ex parte* Virginia, 100 U. S., 339; Duncan *vs.* Missouri, 152 U. S., 382.)

The Supreme Court of the United States in an unanimous opinion on the equality of the citizens in Dent *vs.* West Virginia, above, says:

"The great purpose of the requirement — to be that it shall exclude everything arbitrary or capricious in legislation affecting the rights of the citizen." The same court speaking through Justice Matthews in Yick *vs.* Hopkins, *sup.*, says:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

And the same court in Barber *vs.* Conley put the same thought in the following language:

109 "These provisions are undoubtedly intended that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. That all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement

of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

We do not mean to say by this that the State of Texas does not have the power to prescribe regulations to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation sometimes of a special character having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary for general benefits, such as for supplying water, preventing fires, lighting districts, clearing streets, opening parks and many other objects. As said by the courts, occasions for these purposes may press with more or less weight on one than upon another; but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote with as little inconvenience as possible, the general good. Though in many respects, necessarily special in their character, these in proper limitations do not furnish just ground of complaint, if they operate alike upon all persons and property under the same circumstances and conditions.

This statute under discussion is clearly class legislation, discriminating against some and favoring others. It is not that character of legislation which, in carrying out a public purpose, is limited in its application and within the sphere of its operation, affects alike all persons similarly situated. It may affect and does affect individuals of the same class in an opposite way. It favors some individuals of a certain class, and denounces other individuals of the same class. This statute exempts no class. On the contrary, it seeks to exempt certain classes of property, which is carrying the doctrine beyond any case to which we have had access. All property in the State is entitled to equal protection, and no special property is entitled or ought to receive any special favors. Discrimination may be as patent against the citizen in the direction of his property as if aimed directly against himself personally. The right to hold or sell property, and to make agreements and contracts concerning it, which may be believed by the owner to be for his betterment, is the most essential right of property. With some citizens this right is taken away, with others it is encouraged.

But it is contended upon the part of the State that the act is valid in restraint of trade on the ground of public policy; that the combinations in restraint of trade are public acts, an additional reason against the law in this particular, that if that be true, all of the acts in restraint of trade are not public, but many of them are private, and when we look closely to the object of the act, it will be seen that the business of the farmer in growing vegetables, grain, cotton, wool or meat is no more of a private occupation than that of the

shoemaker, the blacksmith or the bricklayer. If the anti-trust act of 1889, under discussion, applied only to those occupations where the business implies a trust of public duty, such as railways, telegraphs, telephones, etc., then the argument might be plausible that it is not class legislation, but such is not the case; the penalties are visited not only upon those exercising a public trust or duty, but upon the body of private citizenship composed of artisans, mechanics, professional men, traders and the like, giving advantage to certain persons that it refuses to others.

Judge Simkins in the case of Railway *vs.* Willson, 19 S. W. Rep., 913, in discussing this question, said:

"In those occupations where the business implies a trust or public duty, the Government has the power to see that the trust is not disturbed, and the duty is properly performed. On this principle statutes have been upheld that regulate the charges of railway companies, elevator, telephone, telegraph and other companies, hackmen, warehousemen, mills, etc., but we are aware of no well-considered case on which a statute has been upheld that undertook to regulate the dealings between employer and employé."

The exemption of agricultural products in the hands of the original producer and raiser, exempts, upon a rough estimate, four-fifths of the people of Texas from the operation of this act, because four-fifths of the people of Texas are engaged in the business of producing and raising agricultural products and live stock. The penalties are visited upon the remaining one-fifth of the people without regard to any particular class. This one-fifth comprises all classes and conditions not heretofore exempted. And this, in the face of the constitutional guarantees, State and Federal, of perfect equality of the citizens before the law. Even in the matter of labor, the iniquitous character of the enactment under discussion is apparent. This statute makes no exemption of labor or of the products of labor. Under its terms and provisions the laborer is subjected to punishment for doing the very act that the land-owner or farmer is authorized to do. The original producer, if a farmer, has authority to combine to fix prices, restrict trade, build up monopolies, while the original producers in other lines of labor are denounced for combining. The agricultural products of the farmer are the fruits of his labor, but no more so than the manufactured articles of the workingman are the fruits of his labor. The blacksmith, the carpenter, and all other artisans purchase their raw material, and the manufactured products constitute the fruits of the labor, and upon which they must rely for the sustenance of themselves and families, just as the agricultural products of the farmer constitute the fruits of his labor, and upon which he relies for similar purposes; yet the statute prescribes total inequality between these classes, and encourages the one to build up monopolies while denouncing the others, if they make any attempt in the same direction. Or, to apply the provisions of the statute to the matter of live stock, from which application this inequality becomes still more apparent, the cattle king may raise his thousands of head of live stock each year, and so long as this stock remains in his hands,

he can combine, not only with his neighbors, but with all other similar original producers throughout the State of Texas, or even throughout the United States for the purpose of fixing the prices and monopolizing markets. Not so, however, with the hands which he employs, and which constitutes the ordinary labor of the ranch. The fruits of the labor of the latter class are his day's work. This may be paid him either in money, which he invests in stock, or it may be paid him in stock, or shares, or otherwise, and yet, not being the original producer, he is forbidden to make any combination of any character whereby the price of the fruits of his labor can be promoted or regulated in any manner whatsoever. These common laborers on the ranch can form no agreement among themselves whereby they can combine with other ranch-owners with reference to the prices of their products which constitute the fruits of their labor. The demonstration can be carried to a further absurdity by simply calling attention to the fact that under the terms of the statute the farmer or stock-raiser may combine with any person, firm or corporation whomsoever, or any number of them in respect to agricultural products he has produced, or the live stock he has raised, without fear of punishment under the law, and yet, the party, or parties with whom he makes such a combination, may be held liable to all the penalties denounced against such combinations. Two citizens may combine, therefore, for the purpose of fixing prices, one by doing so committing a crime, and the other by doing so, performing a laudable act. If this is equality before the law within the meaning of the Constitution, we had better revise the Constitution.

All of the decisions hold that where a distinction is necessary in classes or citizens under the law, that in every instance, the classification must be reasonable.

What ground can there be for setting aside as this act has done, four-fifths of the citizens of Texas as an exempt class from the punishment for felony because they are producing farmers? It is not because they are poor, and if some of them are, they do not constitute all of the poor; it is not because of the character and location of their occupations, neither can it be said to be on account of the lack of intelligence or ability to take care of themselves; it cannot be on account of the character of the products they produce, for one of the avowed purposes of the act was to prevent combinations and injury to the people of the State; to protect them in their acquirements of the commodities necessary for the enjoyment and sustenance of life, and yet the act puts it within the power of the men who produce nearly all of these articles to combine and raise the price and control it in any way they please. But it is argued that on account of the large district of the country over which they are distributed, that they cannot combine, and therefore, it would have been useless to include them within the prohibition of the act.

While there was no evidence before the court on this subject, we were asked to take judicial notice of the fact; we hardly find the allegation correct. The Swine Breeders' Association of the State of Texas, the proceedings of whose meetings are published in the pub-

lic press of the country, the enormous wealth of the cattle-raiser, the efforts, most energetic, of the cotton-grower to limit the acreage by a combination with his fellows for the purpose of decreasing the quantity and thus raise the price to the consumer, are well known everywhere. But if it should be true that the producing agriculturists do not have the power to combine, what reason is that, that he should be excluded from the penalty prescribed for combining? This is a strange proposition, indeed; yet it is gravely argued in this tribunal by the representatives of the State, that the principal reason for granting to so large a body of citizens absolute immunity from punishment for felony for combining in restraint of trade, is the fact that they are utterly unable to avail themselves of the great privilege thus granted. The court apprehends that this would not be accepted as a valid reason anywhere. Nor can it be successfully contended that the proposition is correct, that the producing agriculturist is unable to combine nor that he has any privilege or rights on account of his location or occupation.

We are familiar with the duties of the farmer, and the cares and trials of his business life, and appreciate highly the customary compliments paid by mankind to the rural yeomanry of the land; he has been justly lauded for his integrity and for the independence and importance of his calling; without the products of his toil people cannot live, nor society endure; yet, what is there about it all to entitle him to the privilege of combining in restraint of trade as to these articles he produces, while his neighbor, the storekeeper and mechanics are precluded therefrom, and he himself is debarred from engaging with the same exemption from bartering in the products of his neighbor.

If there is any one thing evident from a careful study of the act, it is that it is aimed to favor the agricultural class, and is against the merchant and mechanic and all the others, without either reason or justice.

I apprehend that it will not be questioned that the business of merchandising is not only legitimate, but laudable. Millions of people of this and other lands have made and are making their honest living and millions more are being accommodated and served thereby. Great empires, both ancient and modern, have built their strength and glory on their trade, and today we have great arteries of steel transportation pulsating across the continent and white-winged fleets of commerce traverse the seas. They not only carry the fruits of the labor of the agriculturist, but what would he and the fruits of his labor be worth without them? The merchant, the manufacturer, the agriculturist—three great classes of the world, each dependent upon the other, each entitled to the same protection before the law, each justly claim alike under the Constitution the right of life, liberty and property; they constitute one mighty people, citizens of one Republic, all deserving of our care, all governed by the same laws, whose rights shall be weighed in the same balance that shall not swerve a hair's breadth in favor of either while being held by the blind goddess of Justice.

Although the reasons alleged in support of the act by the State

are inapplicable and invalid and do not properly state the purpose for which the act was really passed, of course there was a purpose behind so important a piece of legislation—one that formulated the thing and procured its passage. Such a purpose is patent upon its face and is apparent from the history of the act. It is a purpose thoroughly appreciated by the court, and recognized by the public, but it is such a purpose that the Constitution of the United States will not support nor the courts thereof favor.

The court can find no better language in this connection—almost prophetic in some respects—than that used by Judge Catron of Tennessee in two early cases, viz., Wally *vs.* Kennedy, 2 Yerger, 555, and Van Zandt *vs.* Waddell, same volume, 270:

"The rights of every citizen must stand or fall by the same rule of law that governs every other member of the body politic, or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the most of the community, and those who made the law, by another; whereas a like and general law affecting the whole community equally could not have been passed.

"The idea of people through their representatives making laws whereby are swept away the life, liberty and property of one or a few citizens by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constitution."

This law that deprives the citizen of many of his rights of contract and that seeks to divide citizens, not exactly by the calling they follow, but by the source of the property they hold, and exempts 80 per cent. of them from the penalties it visits upon the remainder, is not sustained by any good reason or excuse, is not just, is utterly without support in law and can have no just purpose, is vicious class legislation, depriving the citizen of his constitutional right of life, liberty and property, without due process of law, contrary to the law of the land, and is therefore declared to be null and void.

The relator is discharged.

110 *Orders Entered in U. S. Circuit Court at Dallas Discharging the Relator.*

Ex Parte WM. GRICE, Relator; JOHN W. BAKER, Respondent. 2062.

FEBR'Y 22D, 1897.

On this day the above styled and numbered cause came on to be further heard and considered, the same having been argued and submitted at a former day of this term, and thereupon it was ordered and adjudged by court, for the reasons stated in the opinion herein filed, that the relator, Wm. Grice, be, and he is hereby, finally discharged upon the writ of *habeas corpus* herein granted, and that he, the said Wm. Grice, do have and recover of the respondent, John W. Baker, all his costs in this behalf expended, for which let execution issue.

111 *Bill of Exceptions of the Respondent.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

Ex Parte WM. GRICE; JOHN W. BAKER, Sheriff McLennan County, Texas, Respondent. No. 2062.

Respondent's bill of exceptions.

Be it remembered that on the trial of the above entitled and numbered cause the following proceedings were had therein:

Relator presented to the court his petition for a writ of *habeas corpus*, respondent presented his amended return on the writ of *habeas corpus*, both of which are set out in this record, and, by agreement of the parties made in open court, are to be marked respectively Exhibits "A" and "B," and are to be considered as incorporated in this bill.

The relator then offered the following evidence:

1st. The writ of *habeas corpus* set out in this record and, by agreement of the parties in open court, to be considered as incorporated in this bill.

2nd. The original indictment against the relator and others filed in the district court of McLennan county, Texas, set out in the record, and, by agreement of the parties made in open court, is to be considered as incorporated herein.

3rd. All of the exhibits attached to plaintiff's petition for writ of *habeas corpus* which are set out in the record and for the purpose of this bill are, by agreement of the parties made in open court, considered as incorporated herein.

4th. An extract from the report of the Commissioner of Agriculture, statistics and history of the State of Texas, which is incorporated in the record and considered as a part hereof. To the admission of this extract from said report the counsel for the respondent objected on the following grounds:

112 First. Because same was incompetent.

Second. Because the statistics of which it constituted a part were not required to be gathered by the laws of Texas; all of which objections were by the court overruled and said extracts from the statistics admitted; to which ruling and action of the court the respondent then and there in open court excepted.

5th. The relator also offered in evidence an extract from the census report of 1890, which is set out in this record, by agreement of the parties made in open court is considered a part hereof; to the admission of which the respondent objected on the ground that the *the* same is incompetent, irrelevant, and not properly authenticated.

6th. The relator read in evidence the original return of the respondent, which is incorporated in the record and, by agreement of counsel, is to be considered a part hereof.

7th. The respondent read in evidence his amended return, which is set out in the record and marked Exhibit "B" and made a part hereof, together with all of the exhibits thereto attached.

8th. The respondent also read in evidence the admission of defendant, in substance and effect, that he was out on bail and not confined in prison until the day the application for *habeas corpus* was made, and that his counsel, with his consent, requested said sureties to surrender him to respondent, the sheriff of McLennan county, Texas, in order that the writ of *habeas corpus* might be sued out.

After hearing all of the evidence the court did on the 22nd day of February, 1897, render an opinion, holding, first, that the writ of *habeas corpus* was properly granted, and that this court properly exercised jurisdiction in this proceeding; second, that the circumstances surrounding this case were of such urgent character in the discretion of the court as to justify the issuance of the writ of *habeas corpus* in this case and to determine the rightfulness of the discharge of the prisoner before trial had in the State court on the merits of the case; third, that the statute under which said relator stands indicted is void because enacted in violation of the Constitution of the United States, in that it denies to certain persons equality
113 before the law and is particularly violative of the 14th amendment to the Federal constitution, all as set forth in the opinion of the court. Said court also entered an order discharging said relator, which order was entered on the 22nd day of February, 1897; to which action and judgment of the court, as well as to all of the actions and orders above mentioned, including the admission of testimony over respondent's objections, the respondent then and there in open court excepted, and now prays that this bill of exceptions be allowed, signed, sealed, and filed as a part of the record herein, and that the petition for writ of *habeas corpus*, the *habeas corpus*, the amended return of the respondent and all exhibits thereto, the opinion of the court, above described, as well as all other documents in this bill of exceptions mentioned, including the order of the court discharging said relator and the recognizance into which this court has ordered him to enter, the appeal bond,

which is herewith filed, and assignments of error, to be hereafter filed, as a part of this record in this case and a part of this bill, in conformity to the agreement of counsel, made in open court.

All of which is accordingly done.

Done this 22d day of February, 1897.

CHAS. SWAYNE, *Judge.*

The foregoing has the following endorsement, to wit:

Ex parte Wm. Grice; J. W. Baker, sh'ff, &c., respondent. Bill of exceptions. No. 2062. Filed Feb. 22, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

114 *Recognizance.*

Ex Parte WM. GRICE, Relator; JOHN W. BAKER, Respondent. 2062.

FEBR'Y 22, 1897.

On this day came into open court Wm. Grice, as principal, and J. E. Schneider and Kane Shields, as sureties, and jointly and severally acknowledge themselves to owe and to be indebted unto the United States of America in the sum of one thousand ($1,000.00) dollars; for the payment of which, well and truly to be made, they bind themselves, their heirs and legal representatives.

To be void, however, upon condition that the said Wm. Grice, principal, pending the final determination of the issues herein, will appear at the present term of this court, at Dallas, Texas, and from day to day and term to term hereafter, and then and there stand to, abide by, and perform the order, direction, and judgments of this court in this case; otherwise this obligation to be and remain in full force and effect.

115 *Respondent's Petition for Appeal, Allowance Thereof, and Waiver of Citation, &c.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

Ex Parte WM. GRICE; JOHN W. BAKER, Sheriff of McLennan County, Texas, Respondent. No. 2062.

The above-named respondent, John W. Baker, sheriff of McLennan county, Texas, conceiving he is aggrieved by the order entered on February 22nd, 1897, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

CULLEN F. THOMAS AND
M. M. CRANE,
Attorneys for Respondent and Applicant, John W. Baker, Sheriff of McLennan County, Texas.

The issuance and service of citation on above application for appeal are hereby specially waived.

WM. GRICE,
By GEO. CLARK, *Att'y.*

The above application for appeal to the Supreme Court of the United States is on this day, to wit, February 22nd, 1897, allowed as prayed for, upon said respondent entering into bond, within the time and conditions as the law requires, in the sum of two hundred and fifty dollars, payable to relator.

CHAS. SWAYNE, *Judge.*

The foregoing has the following endorsement, to wit:
No. 2062. *Ex parte* Wm. Grice. Petition for appeal, allowance thereof, and waiver of citation, &c. Filed Feb. 22, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

116 *Appeal Bond of John W. Baker.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

No. 2062. *Ex Parte* Wm. Grice.

Know all men by these presents that we, John W. Baker, sheriff of McLennan county, Texas, as principal, and Ben. E. Cabell and J. S. Lewis, as sureties, are held and firmly bound unto Wm. Grice, appellee herein, in the full and just sum of two hundred and fifty ($250.00) dollars, to be paid to the said Wm. Grice, appellee, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of February, A. D. 1897.

Whereas, on this day, in the circuit court of the United States for the northern district of Texas, in a suit pending in said court between Wm. Grice, relator, and John W. Baker, respondent, sheriff of McLennan county, Texas, an order and judgment was rendered against the said respondent, sheriff of McLennan county, Texas, in a proceeding of *habeas corpus*, and the said relator was, by said order and judgment, discharged and released from the custody of said respondent, who held him in charge as sheriff of McLennan county, Texas; which said judgment and order was rendered against the said John W. Baker, sheriff as aforesaid, and the said John W. Baker, sheriff, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse said judgment and order in the aforesaid suit, and issuance and citation having been specifically waived by the said relator, citing and admonishing him to be and appear at a session of the United States Supreme Court:

Now, the condition of the above obligation is such that if the said John W. Baker, sheriff of McLennan county, Texas, shall prosecute

his said appeal to effect and answer all damages and costs if
117 he fails to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

J. W. BAKER.
BEN. E. CABELL.
J. S. LEWIS.

Above bond taken and approved this 22nd day of February, 1897.

CHAS. SWAYNE, *Judge.*

The foregoing has the following endorsement, to wit:
No. 2062. *Ex parte* Wm. Grice. Appeal bond. Filed Feb'y 22, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

118 *Assignment of Errors.*

In the Supreme Court of the United States, A. D. 1897.

Ex Parte WM. GRICE; JOHN W. BAKER, Sheriff of McLennan County, Texas, Respondent. No. 2062.

In re application of Wm. Grice for writ of *habeas corpus.*

Now at this time comes the respondent, and, in connection with his application for appeal this day granted, makes the following assignment of errors, which, he avers, occurred upon the trial of this cause, to wit:

1. The court erred in admitting in evidence over the objection of respondent an extract from the report of the Commissioner of Agriculture—Insurance, Statistics, and History of Texas—showing the number of farmers in Texas, because the same was incompetent, irrelevant, and for other reasons set forth in the bill of exceptions.

2nd. The court erred in admitting in evidence an extract from the report of the census of 1890 and the statistic- therein because same was incompetent and not properly authenticated, was irrelevant and immaterial, said extract showing in substance the number of farmers and stock-raisers in the United States.

3. The court erred in holding, in his opinion delivered on the trial, that the writ of *habeas corpus* had been properly granted, and that the circuit court of the United States could properly exercise jurisdiction in this proceeding in advance of the trial by the State court.

4. The court erred in holding in substance that the trial of Hathaway, who had severed from the other defendants, was virtually the trial of this relator.

5. The court erred in discharging the prisoner and not remanding him to the State courts for trial in order that he might pursue his legal and orderly remedy so often pointed out by the Supreme Court, viz., the writ of error, in the event the State court should decide against him.

119 6. The court erred in holding that the Texas statute under which relator was being prosecuted violates any portion of the Constitution of the United States and denies to any person equality before the law, and that it is in any sense violative of the 14th amendment to the Federal Constitution.

7. The court erred in holding that the statute was void because in restraint of the personal liberty of the citizen to enter into such contracts as to him might seem fit.

8. The court erred in attributing to the legislature any motive other than that of the public good in undertaking to prevent agreements in restraint of trade that were hurtful to society.

9. The court erred in holding in effect that the passage of this law did not involve the exercise of the police power of the State in undertaking to prohibit contracts in restraint of trade, which the experience of generations has proven to be hurtful to the community.

10. The court erred in holding that the exemption of agricultural products while in the hands of the persons producing them, and the exemption of live stock while in the hands of those who raised them, invalidated the statute, because said exemption is such an one as properly addressed itself to the legislative discretion and was not an arbitrary discrimination in favor of or against any class.

11. The court erred in not holding as a matter of law that the agreements made among producers and those who raise live stock, if any such have been made in restraint of trade, were not injurious to the general public, and therefore this statute exempting them from the penalties was not an arbitrary use of legislative power.

12. The court erred in entering judgment in favor of the relator and discharging him from the custody of the respondent.

CULLEN F. THOMAS,
M. M. CRANE,
Attorneys for Respondent.

The foregoing has the following endorsement, to wit:
No. 2062. *Ex parte* Wm. Grice. Assignment of errors. Filed Feb. 22, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

120 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you or some of you, between William Grice, relator, and John W. Baker, sheriff, respondent, a manifest error hath happened, to the great damage of the said John W. Baker, sheriff, respondent, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment

be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in not exceeding thirty days from February 22nd, 1897, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and of American Independence the 121st year.

J. H. FINKS,
Clerk of said Circuit Court of the United States for the Northern District of Texas,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—

CHAS. SWAYNE,
U. S. District Judge.

[Endorsed:] Filed Feb. 22, 1897. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

121 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record, bill of exceptions, assignment of errors, and all proceedings had in cause No. 2062, wherein William Grice is relator and John W. Baker, sheriff, is respondent, except that the original writ of error (citation in error being waived) is included therein instead of a copy thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand officially and the seal of said court, at Dallas, Texas, this the 5th day of March, A. D. 1897.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk,*
By CHAS. H. LEDNUM, *Deputy.*

122 In the Supreme Court of the United States.

JOHN W. BAKER, Sheriff, etc., Appellant,
vs.
WILLIAM GRICE, Appellee.

JOHN W. BAKER, Sheriff, etc., Appellant,
vs.
F. A. AUSTIN, Appellee.

JOHN W. BAKER, Sheriff, etc.,
vs.
W. E. HAWKINS, Appellee.

JOHN W. BAKER, Sheriff, etc., Appellant,
vs.
ARTHUR M. FINLEY, Appellee.

The above four cases are based upon the same facts and upon the same statute. The decision of one will necessarily decide every question in each of the others. It is therefore hereby agreed and stipulated by and between appellant and all of appellees therein that the record in one case only may be printed, and that the other three cases be tried at the same time and on the same date with the one in which the record shall be printed, subject to the approval of the court and without prejudice.

M. M. CRANE,
Counsel for Appellant.
GEO. CLARK,
Of Counsel for Appellees.

123 [Endorsed:] Case No. 16,537, &c. Supreme Court U. S., October term, 1896. Term Nos., 758, 759, 760, 761. Jno. W. Baker, sheriff, &c., app'l't, *vs.* William Grice; same *vs.* Austin; same *vs.* Hawkins, and same *vs.* Finley. Stipulation that one record only be printed & that the other three cases abide decision in that case. Filed Mar. 25, 1897.

Endorsed on cover: Case No. 16,537. N. Texas C. C. U. S. Term No., 758. John W. Baker, sheriff of McLennan county, Texas, appellant, *vs.* William Grice. Filed March 25, 1897.

No. 336.

Brief of M. M. Crane for Appt.

SEP 28 1897

JAMES H. McKENNEY

Filed Sept. 24, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

NO. 336.

JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

vs.

WILLIAM ORICE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLANT.

M. M. CRANE,
Att'y for John W. Baker, sheriff, etc., appellant.

PRINTED BY THE GAZETTE PUBLISHING CO., WACO, TEXAS.

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

NO. .....

JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

vs.

WILLIAM GRICE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The appellee was jointly indicted with one Hathaway and thirteen others, in the District Court of McLennan County, Texas, for a violation of the anti-trust law of that State. The indictment was found at the November term, 1894. (Record p. 8.) The charge was a felony. On the 9th day of December, 1896, he applied to the Circuit Court of the United States for the Northern District of Texas for a writ of *habeas corpus*, in which he stated, in substance, that the Texas statute upon which the indictment was based was void. (1.) Because it conflicted with the fourteenth amendment to the Federal Constitution, by denying to all persons equality before the law. (Record pp. 2-8, inc.) (2.) That it was intended to operate beyond the territorial limits of the State and was a restriction on interstate commerce.

In addition to these material allegations, it was also stated that the case of the appellee and the others who had been jointly indicted with him who had been arrested, was called for trial in said court on the second day of December, 1895, and that under the provisions of the Texas Code of Criminal Procedure, a severance was had, and Hathaway was alone put upon trial. (Record p. 3.) The application set out at great length the proceedings had at that trial including the motion to quash the indictment, based, among other things, upon the ground that the act under which he was indicted was void for the reason set up in the application, viz., that it conflicted with the fourteenth amendment to the Federal Constitution. It alleged that this motion was overruled. That the trial resulted in a verdict of guilty against Hathaway. His punishment was assessed at a fine of $50.00; that his motion for a new trial was overruled, and he appealed to the Court of Criminal Appeals of Texas. That he was compelled to remain in jail several months during the time his appeal was pending in the State court. That notwithstanding the fact that a fine was the only punishment assessed against him, under the laws of Texas it operated as a conviction of a felony. That his case was reversed and remanded to the trial court, the Court of Appeals holding the evidence against him insufficient, the court failing to pass on the constitutional question.

The application also stated that since Hathaway's case was reversed by the court of last resort in Texas, "and while the petitioner and his codefendants, who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial nor has said cause been set for trial but the same has been permitted to remain upon the docket of said court subjecting this petitioner and his codefendants not only to the shame and contumely of an indictment for felony, but denying to himself and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner and his codefendants are without remedy in the State Courts of Texas for the assertion and vindication of their rights under the constitution of the United States."

It further alleged that on the 24th day of November, 1896,

Hathaway applied to the Circuit Court of the United States for the Northern District of Texas for a writ of *habeas corpus*, and that the writ was granted and made returnable on the same day. That a hearing on said application for said writ of *habeas corpus* was set for the 7th day of December, 1896. That on the said 7th day of December, 1896, the case against Hathaway was dismissed in the State court. It was charged that this was done for the purpose of preventing the Federal Court from passing upon the constitutional rights of Hathaway.

Attached to this application was a copy of the indictment in the State court, together with a purported copy of the speech of the prosecuting officer in the trial of Hathaway, the brief of counsel who appealed Hathaway's case to the Court of Criminal Appeals, and much other irrelevant matter. (Record pp. 8-65 inc.)

Upon this application the court directed a writ of *habeas corpus* to be issued as prayed for. It was made returnable to the court at Waco, Texas. (Record p. 65.) The writ was issued, upon which the appellant, John W. Baker, Sheriff of McLennan County, made his return in substance that he had thereby produced the body of appellee in open court, and that he held him by virtue of a capias issued out of the District Court of the 54th Judicial District of the State of Texas, upon an indictment preferred in said court against said appellee and others in a certain criminal case numbered and entitled 871, the State of Texas v. John D. Rockefeller et al.; said appellee having been charged with being engaged with others in a conspiracy against trade, in violation of an act of the Legislature, described as the Act of 1889. (Record p. 66.)

The appellee was admitted to bail in the sum of one thousand dollars. (Record p. 67.)

On the 11th day of December, 1896, the case was transferred to the branch of the same court at Dallas, Texas, for trial, and was set down for January 11, 1897. (Record p. 68.)

On January 11, 1897, appellant, John W. Baker, sheriff, etc., filed an amended return, which stated substantially:

1. That he produced in open court as directed by the writ of *habeas corpus* the body of appellee. That heheld him by virtue of a capias issued out of the 54th Judicial District of the

State of Texas, upon an indictment preferred in said court in cause No. 871, entitled the State of Texas v. John D. Rockefeller et al; said appellee being charged by indictment, with others, with having engaged in a conspiracy against trade, in violation of an act of the Legislature of the State of Texas, entitled "An act to define trusts and to provide the penalties and punishment of corporations, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889.

2. That the authorities of the State of Texas have been vigilant and diligent in the discharge of their respective duties towards the relator and his codefendants. That said authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore mentioned, a speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own (relator and his codefendants) seeking, and by virtue of their own acts; that the call docket of the district court records of the 54th Judicial District of the State of Texas where said indictment is pending, show that at the first term of said court after said indictment was presented, said cause was set down for trial on March 14th. That upon the call of said docket for trial, it was continued by agreement between the State and the defendants. That at the succeeding September term the case was set down for trial on October 4th. But that on the call of the same for trial on that day it was continued upon motion of the defendants. That it was again set down for the November term, to be tried on the 2nd day of December, 1895; that when the cause was called for trial, the defendants, including the relator, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein. For the verification of the foregoing statements, reference was made to the certified copy of the records of the 54th Judicial District of the State of Texas, marked "Exhibit A," and attached thereto.

3. Respondent further alleged that he was informed and believed, and so charged, that the avowed purpose of the relator and his codefendants was to delay, if possible to defeat, the

jurisdiction of the courts of Texas in the administration of its laws, which he and his codefendants were charged with having violated. That in pursuance of said purpose, the relator and his codefendants had plotted and concocted a set of facts and circumstances for the express object of appealing to that judicial discretion lodged in that court for granting writs of *habeas corpus;* that this relator and his codefendants had conspired among themselves to have their several sureties to surrender them into his (meaning the sheriff's) lawful custody, as sheriff of McLennan County, Texas. That by their own acts and at their own request, and by their own procurement, the sureties of relator and his codefendants did surrender them, and that on the very day of the surrender of this relator, contemporaneously with the surrender, and in obedience to the petition of relator, a writ of *habeas corpus* issued out of that court, and was served upon him as sheriff of McLennan County, commanding him to produce before the court instanter the body of relator, held in his lawful custody.

To verify which the affidavits of the sureties of relator and his codefendants, marked "Exhibit B," were attached to said return and made a part thereof, by agreement with counsel of relator, in lieu of the evidence of said sureties before that court. This return of the sheriff was served by him officially as sheriff of McLennan County, Texas. (Record, pp. 68-70.)

Exhibit A attached to this return consisted of a certificate of the clerk of the District Court, being the court in which the indictment was pending, to the effect that at the March term, 1895, of that court, the following order was entered by the District Judge: "Set for May 14th. Continued by consent."

For the September term, 1895, the following entry of the District Judge was made: "October 4th. Continued by defendants, and case set for December 2nd."

For the November term, the following entry was made: "December 2nd, defendants sever, and E. T. Hathaway upon trial first."

For the March term, 1896, the following entry was made: "Appealed as to Hathaway."

For the September term, 1896, the following is a true and correct copy: "Passed."

For the November term, 1896, the following entry was made: "December 7th, this cause dismissed as to defendant E. T. Hathaway by County Attorney." (Record, p. 70.)

Exhibit B consisted of the affidavits of Charles Banister and N. S. Hill. Banister testified that he was a surety for Grice and Austin and Finley, in the case heretofore mentioned. That on December 9th, 1896, D. C. Bolinger, Esq., of the late firm of Clark & Bolinger, came to him and told him that he wanted him to surrender Grice. That at the request of Bolinger, he went to the office of Clark & Bolinger, and met the appellees Grice and Austin, and accompanied them to the office of the sheriff of McLennan County, where he surrendered them about 2:30 p. m., December 9th, 1896, to John W. Baker, sheriff of McLennan County, Texas. That in the forenoon of December 12th, 1896, W. A. Hawkins, one of the defendants in said cause, requested him to go the office of Clark & Bolinger for the purpose of surrendering Arthur M. Finley, then in the office. That he accompanied Finley to the sheriff's office, where, at the request of Messrs. Clark & Bolinger, he surrendered him, and where, at the same time, N. S. Hill, a surety for W. E. Hawkins, surrendered said Hawkins, all on the morning of December 12th, 1896. (Record, p. 71.)

N. S. Hill's affidavit, constituting the other part of the exhibit, stated that he was formerly a surety on the recognizance of W. E. Hawkins in the cause heretofore mentioned; that he continued as surety for a period of two years, until about the 9th day of December, 1896. That on said day Hawkins came in person to him and stated that his case was to be removed to the Federal Court, and that he wanted to be surrendered to the custody of the sheriff of McLennan County. That at his request he made the surrender on that day. (Record pp. 71-2.)

On the 11th day of January, 1897, appellee filed what he termed a replication, sworn to by himself alone. He demurred to that part of the amended return which stated that the delay in the determination of the indictment against the relator had come in a great part from the relator's own seeking, and by virtue of relator's own acts as was pretended to be shown by the docket entries on the docket of said court.

1. Because said facts were wholly immaterial and irrelevant,

because there was no complaint that there was any delay prior to the conviction of relator's codefendant, Hathaway, which occurred in December, 1895.

2. He demurred to that portion of the return which avers that the relator, in conjunction with his codefendants, had conspired and concocted facts and circumstances for the express object of involving the judicial discretion of the court for granting a writ of *habeas corpus;* and that they had conspired among themselves to have their several sureties surrender them into the hands and custody of the sheriff of McLennan County, Texas, because such facts, if true, did not constitute any justification of the detention of the relator, and furnished no answer to the allegations of the petition of the relator.

3. Because the amended return ought not to have included anything but the true cause of the detention of the relator.

He further answered said return, stating that the relator denied that he and his codefendants and counsel had conspired and confederated as charged in said amended return of the respondent, for the purpose of defeating the jurisdiction of the courts of Texas in the administration of its laws. That for two years he and his codefendants had submitted to the jurisdiction of the courts of Texas for the purpose of trial as aforesaid; and that when it became evident to the relator and his codefendants or relators, that such trial was not to be had except at some indefinite period in the future, if ever, that then the relator, as a citizen of the United States, proceeded to exercise his rights as such citizen, and to call upon the courts of the United States to vindicate his rights, as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purpose as indicated.

This replication was sworn to be true "to the best of his information and belief." (Record, pp. 72-3.)

Upon the issues thus joined the cause proceeded to trial. The relator offered in evidence the several exhibits to his application, hereinbefore mentioned, together with some statistics taken from the Census Reports of the United States, showing the amount and value of the various kinds of farm products raised in the

United States, together with the number of farmers, planters, agricultural laborers, stock raisers, etc. (Record, p. 74.)

On the same point he offered an extract from the report of the Commissioner of Agriculture of the State of Texas.

The respondent read in evidence all of the exhibits attached to his amended return heretofore referred to. Also an admission of the relator in substance and effect that he was out on bail, and not confined in prison until the day the application for *habeas corpus* was made; and that his counsel with his consent requested his sureties to surrender him to respondent, the sheriff of McLennan, County, Texas, in order that the writ of *habeas corpus* might be sued out. (Record, pp. 101-2.)

The court heard the evidence, and on the 22d day of February, 1897, entered an order that for the reasons set out in the opinion filed in said case, that the relator be forever discharged upon the writof *habeas corpus* therein granted, and that he, the said appellee, do have and recover of the respondent all costs, etc. (Record, p. 101.)

In the opinion of the court therewith filed, the court held substantially:

1. That the writ of *habeas corpus* had been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of a trial by the State courts. (Record, pp. 85-6.)

2. That the trial of Hathaway, who had severed from the other defendants, was virtually a trial of the relator. (Record, p. 84.)

3. That the act of the Texas Legislature under which the indictment was found violated the fourteenth amendment to the Federal Constitution, in that it denied to some persons equality before the law. (Record, pp. 89-91, 95-6.)

4. That it was void because in restraint of the personal liberty of a citizen to enter into such contracts as to him might seem fit. (Record, pp. 91-3.)

It hinted that some motive or other than that of the public good inspired the Legislature to pass the law. (Record, p. 100.)

5. That the passage of the law did not involve the exercise a police power of the State; and that the clause exempting agricultural products while in the hands of the person producing

them, and live stock while in the hands of those who raise them, from the operation of the statute, invalidated the entire statute. (Record, pp. 88-9.)

A bill of exceptions covering the various points above mentioned, as well as other matters, was approved and filed.

The statute upon which the prosecution was based and which the Circuit Court declared to be invalid, reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney General or District or County Attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its

charter rights and franchise, and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State; and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis County, in the name of the State of Texas.

"Sec. 5. That the provisions of Chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof, shall be punishedby fine not less than fifty dollars nor more than five thousand dollars,and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belong to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

"Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be com-

mitted or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General or the District or the County Attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

"Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

Approved March 30th, 1889. Acts of 1889, p. 141.

Appellant, on the same day, viz., the 22nd day of February, 1897, applied to the court for an appeal. (Record p. 103.) The appeal was allowed, service of citation on the application therefor having been specially waved. (Record p. 104.)

The appellee entered into a recognizance in the sum of one thousand dollars to await the action of this court. (Record p. 103.)

Appellant gave an appeal bond fixed by the court. (Record p. 104-5.) Appellant filed the following assignments of error in connection with his application for appeal:

"1. The court erred in admitting in evidence over the objection of respondent an extract from the report of the Commissioner of Agriculture Statistics and History of Texas—showing the number of farmers in Texas because the same was incompetent, irrelevant, and for other reasons set forth in the bill of exceptions.

"2. The court erred in admitting in evidence an extract from the report of the census of 1890 and the statistics therein because same was incompetent and not properly authenticated, was irrelevant and immaterial, said extract showing in substance the number of farmers and stock raisers in the United States.

"3. The court erred in holding, in his opinion delivered on the trial, that the writ of *habeas corpus* had been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of the trial by the State court.

"4. The court erred in holding in substance that the trial of Hathaway, who had severed from the other defendants, was virtually the trial of this relator.

"5. The court erred in discharging the prisoner and not remanding him to the State courts for trial in order that he might pursue his legal and orderly remedy so often pointed out by the Supreme Court, viz., a writ or error, in the event the State court should decide against him.

"6. The court erred in holding that the Texas statute under which relator was being prosecuted violated any portion of the Constitution of the United States and denies to any person equality before the law, and that it is in any sense violative of the fourteenth amendment to the Federal Constitution.

"7. The court erred in holding that the statute was void because in restraint of the personal liberty of the citizen to enter into such contracts as to him might seem fit.

"8. The court erred it attributing to the Legislature any motive other than that of the public good in undertaking to prevent agreements in restraint of trade that were hurtful to society.

"9. The court erred in holding in effect that the passage of this law did not involve the exercise of the police power of the State in undertaking to prohibit contracts in restraint of trade, which the experience of generations has proven to be hurtful to the community.

"10. The court erred in holding that the exemption of agricultural products while in the hands of the person producing them, and the exemption of live stock while in the hands of those who raise them, invalidated the statute, because said exemption is such an one as properly addressed itself to the legislative discretion and was not an arbitrary discrimination in favor of or against any class.

"11. The court erred in not holding as a matter of law that the agreements made among producers and those who raise live stock, if any such have been made in restraint of trade, were not injurious to the general public, and therefore this statute exempting them from the penalties was not an arbitrary use of legislative power.

"12. The court erred in *rendering* judgment in favor of the

relator and discharging him from the custody of the respondent. (Record p. 105-6.)

Upon this a writ of error was on the same day issued. (Record p. 106-7.)

It was agreed that the cases of this appellant against F. A. Austin, appellee, and the same appellant against W. E. Hawkins, appellee, and the same appellant against Arthur M. Finley, appellee, would be tried at the same time and on the same date with this case, as the questions involved are identical. (Record p. 108.)

The first and second errors assigned relating to the admission of evidence are hereby waived.

THIRD ASSIGNMENT OF ERROR.

"*The Court erred in holding, in his opinion delivered on the trial, that the writ of habeas corpus has been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of the trial by the State courts.*"

FIFTH ASSIGNMENT OF ERROR.

"*The Court erred in discharging the prisoner and not remanding him to the State courts for trial, in order that he might pursue his legal and orderly remedy so often pointed out by the Supreme Court, viz., the writ of error, in the event the State court should decide against him.*"

The above two assignments, relating to practically the same subject, will be considered together. Appellant's proposition under these assignments is that the Circuit Court had no authority to issue a writ of *habeas corpus* in this case, and that therefore the relator should have been remanded to the custody of the Sheriff of McLennan County, Texas, for the reason that this court has by its decisions well settled the general rule to be that ordinarily a writ of *habeas corpus* will not be granted by a Federal court to take a prisoner from a State court before judgment therein—nor even after judgment; but the relator will be left to the more orderly remedy—a writ of error.

Ex parte Royall, 117 U. S., 241, 250-2.
In re Fonda, 117 U. S., 516-8.

In re Wood, 140 U. S., 291.
Cooke v. Hart, 146 U. S., 183.
In re Frederick, 149 U. S., 70.
New York v. Eno, 155 U. S , 89-98.
Pitts v. Kenney, 155 U. S., 100-1.
In re Chapman, 156 U. S., 215.
Benjamin v. Baker, 157 U. S., 655.
In re Belt, 159 U. S., 100.
Whitton v. Tomlinson, 160 U. S., 241-2.
Washington v. Coovert, 164 U. S., 702.

Were it otherwise decided, writs of *habeas corpus* issued by a Federal court would be made to operate as writs of error.
In re Swan, 150 U. S., 648.
In re Tyler, 149 U. S., 164.
New York v. Eno, supra.

The rule is based upon the additional proposition, that State courts are courts of the American Union and should be treated accordingly. It must be presumed that they will protect all of the rights of the applicant, whether given by Federal or State law.
Robb v. Connerly, 111 U. S., 624.

Appellant concedes that there are exceptions to the general rule above announced. These exceptions had been stated in a general way, but were summarized in the case of Whitton v. Tomlinson. In that case the general proposition above made was announced, but it was also stated, as it had been frequently done before, that in certain exceptional cases the writ might be granted. In discussing this question, the court used the following language:

"In ex parte Royall and in New York v. Eno, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*.

"Such an exceptional case was In re Neagle, 136 U. S., 1, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protect-

ing a judge of the court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a State on a charge of homicide committed in the performance of that duty.

"Such also was In re Loney, 134 U. S., 372, in which a person arrested by order of a magistrate of a State, for perjury in testimony given in the case of a contested Congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted by the State courts would greatly impede and embarrass the administration of justice in a national tribunal.

"Such, again, was Wildenhus's case, 120 U. S., 1, in which the question was decided on *habeas corpus* whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

"*But except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State;* and even after such final determination in those courts, will generally leave the petitioner to the *usual* and *orderly* course of proceeding by *writ of error* from this court." (Italics mine.) Whitton v. Tomlinson, 160 U. S., 241-2.

This case seems to have been reaffirmed in the case of Washington v. Coovert, 164 U. S., 702.

I understand the case of Whitton v. Tomlinson to mean that the circuit courts have no right, under the laws of the United States, to issue writs of *habeas corpus* except in such *peculiar* and *urgent* cases as were therein stated. For instance, as in the Neagle case, where an officer had been designated to execute a Federal law by protecting one of the judges of the Supreme Court; and in the discharge of the duty assigned him, he did an act which was deemed to be a violation of the State law, though conceded to be in strict line of his duty pointed out by the Federal statutes. This court held that it must protect him, or else it would be impotent to execute the Federal laws.

In the Loney case, the court sought to protect a witness against prosecution in a State court for perjury on account of testimony given in a congressional contest, holding in effect that the Federal courts must execute the Federal laws and protect those who are seeking so to do. A different construction would have

greatly impaired and embarrassed the administration of justice. The charge of perjury in that class of cases was within the exclusive jurisdiction and cognizance of the Federal courts.

So in the Wildenhus case. In order to enforce the stipulations of a treaty between the United States and another nation, a Federal court interfered to take away from a State court one of the crew of a foreign merchant vessel charged with the commission of a crime on board a merchant vessel while within a port of the State.

It certainly cannot be said that the case at bar literally falls within any of the exceptions pointed out by this court. Nor can it be said to be one "of such peculiar and urgent cases" as to be exempt from the general rule so well established.

The court below, as well as appellee, seemed to think that this case constituted an exception to the general rule for the following reasons:

1st. Because Hathaway, a co-defendant of appellee, was tried in a State court and the court failed to quash the indictment against him on account of the constitutional objections urged in this case.

2nd. That he was compelled by the laws of Texas to remain in jail while his appeal was pending.

3rd. That the Texas Court of Criminal Appeals failed to pass upon the constitutionality of the statute in question, but contented itself with ascertaining that the evidence was insufficient to justify a conviction.

4th. Because the State court permitted the prosecution against Hathaway to be dismissed after his writ of *habeas corpus* had been granted by the Circuit Court of the United States.

5th. Because a speedy trial was denied to appellee by the State court.

The first four reasons should be brushed aside. The trial of Hathaway was not in any sense the trial of appellee. Where two or more persons are charged in the same indictment with the commission of an offense, the Texas Code of Procedure permits a severance. Art. 706 of the Code of Criminal Procedure reads as follows:

"When two or more defendants are jointly prosecuted, they may sever on the trial upon the request of either."

Art. 708 provides:

"When a severance is obtained the defendants may agree upon the order in which they are to be tried. But in case of their failure to agree, the court shall direct the order of trial.

It is perfectly obvious that when a severance is had, and one of the parties put upon trial, that the others are not tried until the first trial is concluded. It is likewise plain that the result of the first trial can in no wise affect the subsequent trials. It may be that evidence will be offered in the first that will be omitted in any subsequent proceeding. It may be that the ruling of the court will in one be essentially different from that of the other. The truth of these observations is demonstrated by this case. Hathaway was put on trial, and he was convicted. It could not be stated that appellee was convicted. It could not be stated that appellee was kept in jail awaiting the result of Hathaway's appeal. They are two different persons. The one has no more interest in the other's trial than if they had been indicted for the same offense in different indictments. Appellee has no legal grievance because of what was done to Hathaway. Each case must stand on its own merits. And if anything occurred to justify the suing out of a writ of *habeas corpus* by appellee, it must have occurred in his case and not in that of some other person. Because if Hathaway had been acquitted, it would not have profited appellee, because Hathaway might have been acquitted, and appelle convicted. That frequently happens.

As to the fact that Hathaway was compelled to remain in jail pending his appeal, that is a matter over which the State has exclusive control. It has a right to say whether its prisoners convicted of a felony shall remain in jail, or shall be enlarged on bond. No branch of the Federal government, its executive, legislative or judicial, has ever presumed to dictate to any State on questions of that character. The law requiring a prisoner to be kept in jail pending his appeal, after a conviction for felony, violates no part of the Constitution of the United States.

The court below seem to put a good deal of stress upon the fact that the Court of Criminal Appeals failed to pass upon the constitutionality of the statute in the Hathaway case. It ought to be sufficient to say that no court is compelled to decide any

more than enough to dispose of the particular case in hand. The Texas Court of Criminal Appeals found that there was not sufficient evidence against Hathaway to justify his conviction. As to whether there is sufficient against the appellee in this case is yet to be determined. Having found that the evidence against Hathaway was insufficient, the case was reversed, without reference to the constitutionality of the statute, though the court intimated that it might follow the decision of the Supreme Court of the State. I know of no provision by which a court of last resort can be compelled to decide every question in a case. Counsel for appellee in seeking to have a rule of that kind established are struggling after the unattainable. It is not always proper for a court to determine more than enough to dispose of the particular controversy. Sometimes, considered from some standpoints, it is very desirable that every question raised in a case should be settled. The courts themselves must determine when that course is necessary. Certainly there is no power in a Federal court to compel a State court to decide any question in any case before it. Nor is there any power in a State court to compel a Federal court to determine any question involved in a case of which it has jurisdiction. It is a monstrous proposition to assert that the Circuit Court of the United States is clothed with authority to take away from a State court a prisoner of which the State court has jurisdiction, and of whom the State authorities have the custody, for the reason that the courts of the State failed to pass upon every question which the Circuit Court thought was involved in the record of some other case. If that doctrine prevails, then the Circuit Courts of the United States have the power, and it is their duty, to exercise a sort of surveillance over the Supreme Courts of the States, and indicate to them what questions it is necessary for them to decide in each case, or else it will take the prisoner from their jurisdiction and pass upon the questions themselves which they suppose are involved.

The absurdity of that proposition as applied to this case is apparent. It is not Hathaway himself seeking a writ of *habeas corpus* because the Court of Criminal Appeals did not deem it necessary to pass upon the constitutionality of the statute under which he was charged; but it is a codefendant of his complain-

ing because a court of last resort in Texas failed to discharge a supposed duty to Hathaway, which he and his counsel believe was incumbent upon that learned tribunal. Appellee is not complaining because the Court of Criminal Appeals failed to perform its duty to him, but because it failed in its duty to another. In other words, his proposition is, broadly stated, that because the court of last resort in Texas did not see fit to decide the constitutionality of a question in Hathaway's case, that therefore the Circuit Court of the United States ought not to permit this appellee to be submitted to the jurisdiction of that court. How does appellee know that he will not be acquitted in the State court? If he should be acquitted he will have no reason to test the validity of the law.

Then, on the other hand, the appellee complains because Hathaway's case was dismissed after his writ of *habeas corpus* was sued out. It is proper here to state, though the record may not disclose the fact, that Hathaway's case was not dismissed by any of the counsel in this case. That action was taken by Mr. Taylor, then County Attorney of McLennan County, whose alleged speech in the Hathaway case has been so kindly put in the record by counsel for the appellee. He had abundant authority to dismiss the case. It may be found in the following articles of the Texas Code of Criminal Procedure. Art. 709 of that Code reads as follows:

"The attorney representing the State may *at any time*, under the rules provided in article 37, dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party."

Article 37, to which reference is made, reads as follows:

"The District or County Attorney shall not dismiss a case unless he shall file a written statement with the papers in the case, setting out his reasons for such dismissal, which reasons shall be incorporated in the judgment of dismissal, and no case shall be dismissed without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to authorize such dismissal."

Article 710 of the same Code, adds:

"When it is apparent that there is no evidence against a defendant in any case where he is jointly prosecuted with others, the jury may be directed to find a verdict as to such defendant, and if they acquit he may be used as a witness in the case."

The Court of Criminal Appeals had held that there was not sufficient evidence against Hathaway to justify his conviction. The statute under which the County Attorney was operating authorized him in that event to dismiss as to Hathaway at any time. A special verdict in his favor might have been found pending the trial of the others. If "under the law" the County Attorney of McLennan County had the right *at any time* to dismiss the proceeding against Hathaway it is a little singular that the contention should now be made that he had no right to dismiss that case after Hathaway had sued out a writ of *habeas corpus* in the Federal court. Why should the suing out of the writ of *habeas corpus* deprive the County Attorney of the power with which the law had clothed him? When Hathaway's case was dismissed the basis of his complaint was gone. There being no further criminal prosecution pending against him, there was no occasion for his having a writ of *habeas corpus* issued. If Hathaway is now without a complaint, how ridiculous does it appear for the appellee in this case to enter his protest. He objected because Hathaway was charged with a crime, because of the manner of conducting his trial, the admission of the testimony, the address of the prosecuting attorney, the charge of the court—indeed to everything that was done on the Hathaway trial. He likewise objected to his conviction. He objected to his having to remain in jail pending his appeal, and finally because the Court of last resort in Texas did not decide every question involved in that case, and even objected when the Texas courts undertook to dismiss all criminal charges against Hathaway, and was so angered that he straightway went and put himself in the custody of the sheriff, that he might sue out a writ of *habeas corpus*. The prosecution against Hathaway was dismissed on the 7th of December, 1896, and on the 9th day of December, 1896, appellee sued out his writ of *habeas corpus*. (Record pp. .)

In this connection the trial judge indulged in some criticism to the effect that it took a long time for the State court to ascertain that there was not sufficient evidence against Hathaway. That criticism is strangely out of place in a judicial decision. The records of this court and of all other courts of last resort will show that felony cases have, in numerous instances, been

reversed for the reason that the evidence was insufficient to sustain a conviction. But it has rarely ever been intimated that because a trial court differed from a court of last resort as to the sufficiency of the evidence to sustain a conviction, that it was inspired by any other motive than an earnest purpose of enforcing the law. I have no desire to indulge in any criticism of the judge before whom this proceeding was tried, further than to say that there was nothing in the record before him to justify his animadversions on the courts of the State, or the suggestion that they were animated by anything else than a desire to do justice, nor is there anything outside of the record to justify his inferences. Indeed there is nothing in the record to indicate that Hathaway ever sought to secure an earlier trial, or that he endeavored to have his case dismissed at any earlier date. Furthermore, there is nothing in the record to indicate that appellee in this case, or his associates and codefendants sought to have the Hathaway case dismissed, or sought to have an order entered therein setting it down for trial at an earlier date. Nor is there anything in this record, except the inference to be drawn from the application of appellee for a writ of *habeas corpus*, that he ever sought to have his own case set down and tried. If writs of *habeas corpus* can be granted by Federal courts on inferences to be drawn from such allegations as are contained in appellee's application for a writ of *habeas corpus* in this case, it will be a great inducement to those who are seeking to delay prosecutions in the State courts to apply to the Federal courts for such writs. An unseemly struggle will be going on at all times as to which court shall have jurisdiction of the particular prisoner who is charged with an infraction of the law. But if the Federal courts and State courts each recognize the proper limits of their authority, they will move along together as harmonious parts of the same system, each of which is indispensable in its sphere to the execution of the laws of this great country. Against this unseemly struggle, and in favor of the harmonious action of the courts of this union this appeal is being prosecuted, and this argument is made.

As before suggested the contention that a speedy trial was denied appellee cannot be maintained. That charge, if made at

all in the application for a writ of *habeas corpus*, is made in the following paragraph of appellee's application:

"Your petitioner further shows that since the rendition of said judgment by said Court of Criminal Appeals (meaning the Hathaway case) two terms of said District Court of the 54th Judicial District have been held, one of which is now nearing its close; and while this petitioner, together with his codefendants who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants not only to the shame and contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner as well as his codefendants are without a remedy in the State courts of Texas for the assertion and vindication of their rights under the Constitution of the United States. (Record, p. 5.)

It will be noted that the points in the allegation on that paragraph made are as follows:

1. That but *two* terms of court had been held in McLennan County since the decision in the Hathaway case was rendered by the Court of Criminal Appeals.

2. That appellee and his codefendants stood ready and anxious for trial upon said indictment, but that said cause had not even been called by the court for trial, nor had it been set for trial. But no affirmative allegation was made that appellee or any of his codefendants at any time *applied to the court for a trial*, or had *asked to have the case set down so that it might be tried*. Indeed, so far as the allegations in the appellee's application are concerned, it might well be presumed that the cases had never been *regularly reached* upon the trial docket, and if reached, that they were passed for some reason satisfactory to the court and to the parties. That paragraph was answered by the respondent, appellant in this court, in the following language:

"Responding further, I would respectfully show to the court that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties towards this relator and his codefendants. That *said authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore*

mentioned that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come *in a great part of their own seeking*, and by virtue of their own acts. That the call docket of the District Court records of the 54th Judicial District of the State of Texas where said indictment is pending shows that at the first term of said court after said indictment was presented, said cause was set down for trial on March 14th; that upon the call of said docket for trial, it was continued by agreement between the State and the defendants. That at the succeeding September term, the cause was set down for October 4th; but on the call of same for trial on that day, was continued upon motion of the defendants. That it was again set down for the November term to be tried on the 2nd day of December, 1895; that when the case was called the defendants, including relator, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein." (Record p. 69.)

It will thus be seen that there is a substantial denial in this return of the inference to be drawn from appellee's allegation. The distinct statement is made in the return that the State authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore mentioned *that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas.* And that the delay in the determination of the indictment against them has come in *a great part of their own seeking* and *by virtue of their own acts.* It has been determined by this court that the return of a sheriff imports absolute verity on its face:

Crowley v. Christensen, 137 U. S., 86–94.

Applying that rule to this case, it must be held that the denial by appellant in his return of the material allegations made by appellee in his application is a complete refutation thereof.

It may be insisted, however, that the return of the sheriff was controverted, and therefore, that it does not import absolute verity on its face. If controverted it must have been by the replication of appellee. So much of that replication as is applicable to the point under discussion may be found in the following quotation, which is a part of the demurrer in which it was stated that the allegations of delay caused by defendant were irrelevant, as well as the entries on the court docket; the alleged reason was—

"There being no complaint on the part of this relator of any delay in the trial of said indictment in said District Court of McLennan County prior to the conviction of this relator's co-defendant, Hathaway, which occurred in December, 1895." (Record, p. 72.)

The affirmative allegation made in the replication is as follows:

"This relator says that for two years this relator and his codefendants have submitted to the jurisdiction of the courts of Texas for the purpose of trial as aforesaid, and when it became evident to this relator and his codefendants or corelators herein that said trial was not to be had except at some indefinite period in the future, if ever, then this relator, as a citizen of the United States, proceeded to exercise his rights as such citizen, and to call upon the courts of the United States to vindicate his rights as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of the State courts of Texas, but for the purpose indicated. All of which this defendant is ready to verify." (Record, p. 73.)

It will be noted that in this paragraph there is no definite denial of the allegations made by appellant in his return, found on page 69 of the record, to this effect:

"That said authorities (meaning the State authorities) have been anxious and ready to accord all of the defendants, under the indictment heretofore mentioned, that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own seeking, and by virtue of their own acts."

A denial of this allegation seems to have been studiously avoided. Nor is there any direct statement that the appellee or his codefendants attempted to procure a trial of their cases in the State courts before this writ of *habeas corpus* was sued out. They announced that they were ready for trial, but did they enter court and ask for trial, or did they not acquiesce in the delay which was had? The record contains no affirmative allegation that they sought a trial or even sought to have their case set down for trial.

It will be noted that the return of appellant on the writ of *habeas corpus* was not controverted, even by the so-called replication of appellee. But it is submitted that when the court held that the return of a sheriff imports absolute verity on its face unless controverted, it meant that unless controverted by

evidence *aliundi*. In other words, if the applicant should make certain allegations in his petition for writ of *habeas corpus*, and those allegations were denied by the sheriff in his return, no strength could be added to the averment in the petition by a replication sworn to by the applicant only, which restated substantially the same matters as those contained in the petition for writ of *habeas corpus*.

This must be the rule, or otherwise by twice swearing to substantially the same facts, the petitioner is able to destroy the return of the sheriff. The trial of a perjury case may serve to illustrate the point. Most of the States require a charge of perjury to be made out by the testimony of two witnesses, or by one witness and circumstances corroborative in character, equivalent to the testimony of a second witness. This rule cannot be complied with except by the production of the two witnesses, or the one witness and the necessary corroborative circumstances. The mere fact that one witness may twice testify to the same facts will not add any additional force to his testimony. I submit that the rules applicable to *habeas corpus* cases ought to be similarly construed. The application is sworn to. It is controverted by the return of the sheriff. If the applicant desires to destroy the effect which the allegations in the return will have, it must be done by evidence *aliundi*, but certainly not by reswearing himself to the same facts contained in his petition.

But whichever view of the case may be taken, the return of the sheriff was not in this case controverted, as to the main points upon which this application was based; unless inferences and suspicions be indulged in. It devolved upon the appellee in seeking this extraordinary remedy to show by clear and apt averments, and by substantial proof, the existence of the conditions which would constitute this a "peculiar and urgent case," entitling him to a writ of *habeas corpus* before judgment in the State court. There is nothing in the case to bring it within the exceptions pointed out by the court.

The additional circumstance which ought to destroy the application is that the appellee was out on bond, and that he voluntarily procured his surrender into the hands of the sheriff *in order that this proceeding might be brought*. The appellee ad-

mitted in the court below that he was out on bail, and not confined in prison, until the day the application for *habeas corpus* was made; and that his counsel, *with his consent*, requested his sureties to surrender him to respondent, the sheriff of McLennan County, Texas, *in order that the writ of habeas corpus might be sued out.* (Rec., p. 102, sub. 8.)

The records of judicial tribunals may be searched in vain for another instance where the defendant in a State court has voluntarily surrendered himself into the actual custody of the officers, instead of remaining at large upon his bond, in order that he might sue out a writ of *habeas corpus* in a Federal court, and thus impede and obstruct the procedure of the State courts, and then claim that his was a *peculiar* and *urgent* case, that did not come within the operation of the general rules so clearly laid down by this court. The appellee should have been left by the Circuit Court where he had voluntarily placed himself; and the Circuit Court erred in interfering with the administration of justice in a State tribunal, when that interference was sought under such circumstances as the record discloses in this case. It was a most flagrant abuse of that judicial discretion with which the court was clothed.

The conflict of jurisdiction between the State and Federal Courts should always be avoided when possible. As this court has many times stated, "State courts are courts of the Union, and they are under as much obligation to enforce the rights of persons, whether based upon the Federal or State Constitutions, as this court can be. Any conflict between the two is unseemly and should be avoided." I submit, therefore, that the exceptions stated in the case of Whitton v. Tomlinson should be adhered to, and that the Federal trial court should not be permitted to assume jurisdiction except in the extraordinary cases therein pointed out, in which no other adequate remedy can be obtained.

It is respectfully submitted that no writ of habeas corpus should have been granted by the Circuit Court of the United States where the party suing out such writ voluntarily surrendered himself into custody for that purpose.

That the appellee in this case did voluntarily surrender him-

self for the purpose stated was admitted in open court. (Subd. 8, Bills of Exception, Record p. 102.)

Republica v. Arnold, 3 Yates, (Pa.,) 263.

Wales v. Whitney, 114 U. S., 564.

6 Mart., (La.,) 569.

It is not denied that the sureties would have a right to surrender the prisoner at any time; but their right to deliver him into the custody of the sheriff, and the fact of his actual delivery, are two different propositions. The difference between the right to the possession of a piece of property, and its actual possession are too plain to admit of discussion. It is a fiction of law to say that appellee was in the custody of his sureties. That means that they had the right to put him in the custody of officers by withdrawing from the contract which they had made with the State to be surety for his appearance into court. But while he is out on bond, he is absolutely free; he is under no actual restraint; and when he surrenders himself into the actual custody of the officers for the *purpose of complaining of that custody*, he is performing an act that he has no right to perform, and one which the writ of *habeas corpus* was never designed to remedy. The writ of *habeas corpus*, I submit, is only to prevent involuntary servitude or involuntary confinement. It was not intended to take the hermit from his cell, or the student from his cloister; nor was it intended to take one from prison, who voluntarily sought imprisonment in order that he might invoke the remedy not for the purpose of securing his freedom—but to take the opinion of this court as to the validity of a statute. The case ought to be regarded in a sense as a fictitious one, instituted for the purpose of testing the validity of the anti-trust statute of Texas, and not in that good faith which the law requires in order to secure a judicial decision. In other words, the time of this court is being taken up by a case the necessity for which never arose. This man was indicted in a State court for the violation of a State statute. He was not in prison except by his own procurement. It is a travesty on justice to say that he was not only entitled to the writ issued by the court that had jurisdiction of him and his case but by the Federal trial court—a court of no greater dignity than the one in which he stood indicted.

Is it not a travesty on justice to say this man who went into voluntary confinement should be entitled to this extraordinary remedy, this forcible interference with a court of equal dignity —a court of the same country—a remedy not allowed except in cases of "peculiar urgency?" Peculiar urgency indeed! There is no urgency in it, peculiar or otherwise. The methods of getting into this court are certainly peculiar. The time of the Circuit Court and of this court, which ought to be devoted to causes pressing for a hearing, must needs be consumed by this man, who rushed into prison in order that he might get this court to determine whether a certain State statute is valid and in the meantime delay all further proceedings by the State court.

Such ingenuity should not be encouraged, nor should this court reward the exercise of such inventive genius.

The appellee's appeal to the Federal court was inspired by a disposition to belittle the State courts. That spirit should not be encouraged. The State and Federal courts are courts of one common country—of a union "indivisible." He who seeks to array the one against the other should receive no encouragement from either.

Is the statute in question void because in restraint of the personal liberty of the citizen to enter into such contracts as to him might seem fit?

The court below held that it was, and made copious quotations from various authorities to establish that proposition. Among these was one from Berthoff v. O'Reilly, 74 New York, 415. The quotation is in the following language: "Liberty in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will to earn his livelihood in any lawful calling, and to pursue any *lawful* trade or avocation." The proposition announced in that case is conceded to be correct. That a citizen has a right to engage in any LAWFUL trade or avocation is self-evident, but the question is, who has the right to determine what is a *lawful* trade or avocation and what is unlawful. This is the material question in this case. The proposition of the trial court is that it is for the court to determine what busi-

ness may or may not be restrained. In other words, the judiciary has a right to settle that question independent of the legislature. To support that proposition the case of J. W. & W. Company v. Jacksonville, 67 Ill., 37, and Ieck v. Anderson, 57 Cal., 251, have been cited. They fail to support the proposition so broadly made by the court. The Illinois case has no application whatever. The court there held that an ordinance of a city which required a railroad company to keep a man by day and a red lantern by night at a certain street crossing where the company had only a single track and where only its usual trains passed, was unreasonable, and particularly as it did not appear that such crossing was unusually dangerous or even more so than the ordinary crossing. The powers of the city conferred on it by its charter were not disclosed in that case, but the decision seemed to be based upon the fact that the ordinance applied to one crossing, but only one. If the ordinance had been general in its terms and applied to all crossings, the question might have been presented as to whether or not the city had the right to make the regulations as to all crossings, but as the case was made that question was not involved.

The application of the California case is not apparent. In it the court held that property could not be confiscated without judicial hearing and judgment after due notice, because confiscation without such hearing was void. Our Texas Supreme Court has several times concurred in that proposition.

The case of Lake View v. Cemetery Company was cited by the court, but it does not support the proposition in its entirety though some of the expressions of the majority of the court tend in that direction. The opposite of the view is clearly stated by the dissenting minority of that court speaking through Mr. Justice Sheldon. Discussing this point, he said:

"Is it for a court to throw itself across the path of the law making power, and annul its enactment made for the welfare of an unexpected populous community, because, in the opinion of the court, it was uncalled for by a sufficient public exigency? In Coates v. The Mayor, supra (7 Cowen, 584), in passing upon this question the court says: 'It is of the nature of legislative bodies to judge of the exigency upon which their laws are founded.' This is believed to be the well settled doctrine upon the subject: that whether there was a sufficient occasion for the exercise of the police power in any given case, is not a judicial

question, but a political question, provided the exercise of the police power be not colorable." Lake View v. Rose Hill Cemetery Co. 70 Ill., 201.

In that opinion, the Chief Justice of the Supreme Court of that State, with Mr. Justice Craig, concurred.

Mr. Cooley states the rule as follows:

"Every person *sui juris* has a right to make use of his liberty in any lawful employment in his own behalf, or to hire it out for the service of others. *The State must always be at liberty to determine what are lawful employments, and to make others unlawful by prohibiting them.* The authority to regulate business embraces every class and variety of occupation, *and may be exercised either in respect to the person who may be employed in the business, or as to the methods in which the business may be conducted.*" Cooley's Elements of Torts, p. 99.

This language was used with reference to the power of a legislature, because it was the legislature that the distinguished author assumed to be the branch of government which had the power to make the regulations in respect to the several callings.

Mr. Teidman, in his excellent work, from which the trial judge made numerous quotations, discusses this question at length, as to whether the power is lodged in the legislature or in the courts to determine when the police regulations are necessary. In his discussion he says:

"Where can these limitations be found (that is the limitation upon the exercise of police power), and in what do they consist? The legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power. . . . . Whenever an act of a legislature contravenes a constitutional provision it is void, and it is the duty of the courts so to declare it, and refuse to enforce it. But is it in the power of the judiciary to declare an act of the legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition? Several eminent judges have more or less strongly insisted upon the doctrine that the authority of the legislature is absolute in those cases in which the Constitution fails to impose a restriction." Teidman's Lim. Pol. Powers, p. 5.

Then, after citing several opinions of distinguished judges, the learned author concluded:

"But notwithstanding the opinions of these eminently respectable judges, the current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limit of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice." Tiedman's Lim. Pol. Powers, page 7.

In the case of Berthoff v. O'Rielly, 74 N. Y., which the learned trial judge cited for his definition of liberty, the proposition here contended for by appellant is most ably maintained. That court said:

"The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." .74 New York, 514.

Again: "Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution." 74 N. Y., 516.

A very able opinion to the same effect may be found in the case of Sharpless v. Mayor, 21 Pa. St., 147, delivered by that great jurist, Chief Justice Jeremiah S. Black. Indeed, it seems to be the settled law of the land. The following authorities illustrate and support the general proposition:

Stone v. Miss., 101 U. S., 814.

Beer Co. v. King, 97, U. S., 25.

Thorpe v. Rutland, 27 Vt., 149.
State v. Wheeler, 25 Conn., 390.
Mayor v. Miln, 11 Peters (U. S.), 139.
Cochran v. Van Serley, 20 Wend., 380.
Donnan v. State, 34 Ala., 232.
Boston v. Cummings, 16 Ga., 112.
Hamilton v. St. Louis Co., 15 Mo., 23.
Wynehamer v. People, 13 N. Y., 390.
Town of Gilfors v. Supervisors, 13 N. Y., 143.
Dibbrell v. Morris Heirs, 15 Southwestern, 87, 90.
United States v. Freight Association, 166 U. S., 290.

The liberty to contract is limited to lawful subjects. The State has a right to make any contract which the legislature deems to be contrary to sound public policy, unlawful. Lotteries have been prohibited for that reason. Dealing in futures is likewise prohibited. Gambling contracts of all kinds are held void because prohibited by law. For the same reason contracts in restraint of trade, the tendency of which is to destroy competition, Texas sought to prohibit. In the language of Mr. Justice Peckham, speaking for this court, its purpose was to prevent the "driving out of business of smaller dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings." The reason for such legislation is forcibly put later on by the same learned justice. His language will bear repetition here. He said:

"Mere reduction in the price of the commodity dealt in might be early paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great or extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods. * * * * * * * when such changes are effected by combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity, and render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result

in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent for a corporation for selling the commodities which he once manufactured or dealt in; having no voice in shaping the business policy of the company, and bound to obey orders issued by others. Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce."

The language of the Supreme Court above cited ought to be a sufficient answer to the suggestion that the legislature of Texas has not the right to prevent contracts in restraint of trade, whose tendency is so injurious to society, even though to a limited extent, the liberty of the citizen may be thereby abridged.

The decision of the lower court was evidently based upon a misconception of the terms of the law. This is plainly shown by the following quotation from the opinion contained in the record:

"It (meaning the law) makes unlawful the making or carrying out of any contract, obligation or agreement by which two or more persons, firms or corporations combine themselves not to sell any article below a standard or common figure. * * * * To pool, combine or unite any interest they may have in connection with the sale and transportation of any article when its price might in any manner be affected. * * *

"An agreement between two or more persons forms a combination between them. An agreement between two or more persons is made as criminal as an agreement between 100. No attempt is made to condemn only acts which are oppressive by reason of their magnitude; it is evident that it is made criminal for two persons to combine as partners, corporators or otherwise in the ordinary business of life, to increase or reduce the price of commodities or fix the standard thereof." (Record, pp. 91-92.)

The construction of the lower court was to the effect that it prevented the formation of partnerships or of corporations.

The act was passed in 1889. The laws of Texas at that date permitted corporations and partnerships to be formed. At the same session of the legislature at which the act was passed, foreign corporations for life insurance were authorized to be admitted in the State for the purpose of doing business. Section 1 of that act reads as follows:

"That companies or associations organized under the laws of any other State of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this State regulating other insurance companies, shall be licensed * * * * to do business in this States," etc.

This act was approved April 3, 1889. See acts of 1889 of the Texas Legislature, p. 98.

On the 19th day of March, 1889, an act was passed authorizing corporations and partnerships to be formed for irrigation. Section 9 of that act reads as follows:

"When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation, or association of persons, except for domestic use by anyone entitled thereto, to so divert the flow of water in said river or stream in such manner and to the extent of depriving said person, corporation, or association of persons in priority the use of the water to which they may be so entitled."

Section 10 reads as follows: "Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the State of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs, and wells, and of conducting, transferring, and furnishing water to all persons entitled to the same, for irrigation and domestic uses, and for the purpose of building storage reservoirs for the collection and storage of water for the uses before mentioned, and for mining, milling, and stock-raising," etc. Session Acts of 1889, Texas Legislature, p. 101.

On March 29th, 1889, an act authorizing railway corporations to be formed was approved, so as to authorize the purchasers of railroad property under foreclosure sale to form corporations on more favorable terms and conditions than would be allowed to those who undertook to construct a railroad from the beginning.

This much has been said for the purpose of showing that it would hardly be probable that the Texas Legislature would on various dates prior to March 21st, 1889, authorize the creation of partnerships and corporations for various purposes, and then on the 21st day of March, 1889, at the same session, pass an act intended to prevent the formation of partnerships and corporations; and then eight days later pass another act which recognized the validity of existing corporations, and attempt to maintain them. That construction leads to such a great absurdity that it ought not be obtain. Surely the Legislature of Texas, or of any other State, would not by implication or construction be held to reverse its intention so many different times during the same session, unless the language of its several acts was susceptible of no other reasonable construction. The several acts passed at the same session disprove the contention of the trial court.

The language of the act itself, considered alone, does not justify the decision of the lower court.

The language upon which the trial court based this singular conclusion reads as follows:

"That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: (1) To create or carry out restrictions in trade. (2) To limit or reduce the production, or increase or reduce the price of merchandise or commodities. (3) To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities. (4) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State. (5) To make or enter into, or execute, or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall

agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

It is plain from the paragraph above quoted that the learned trial judge erred in his construction. That the legislature did not thereby intend to prevent the creation of corporations or firms or partnerships, is manifest. It recognized the existence of partnerships and of corporations as separate entities, but sought to prevent other combinations so as to destroy competition and agreements in restraint of trade. Our Supreme Court, speaking through Associate Justice Denman, practically so held in a recent case. It said:

"In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. * * * If we consider the purpose for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced, is where the partses in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." (Meaning the purposes mentioned in the statute.) Gates v. Hooper, 39 S. W. Rep., 186.

That ought to be conclusive of the question under the well settled rule that the construction placed upon a State statute by its Supreme Court will be conclusive as to the legislative intent. If the contention of the trial judge be correct, the statute should not have stated that persons, corporations and associations of persons should not combine, but it should have stated that no corporation, partnership or association of persons should be permitted to exist for the purpose of carrying on trade for the reason stated, that their contracts would operate in restraint of trade.

The definition of partnership is so essentially different from a trust that it is singular how the trial court fell into such an error. Mr. Bates defines a partnership as "a contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business, as principals, for the purpose of joint profit." (Bates' Law of Partnership, Sec. 1.)

Again, "A partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." (3 Kent's Comm., 23.)

Or, as Mr. Stroud expresses it—"A partnership is an agreement that something shall be attempted with a view to gain, and that the gain shall be divided between them."

Mr. Bouvier defines a partnership as "an agreement between two or more persons for joining together their money, goods, labor and skill, or either or all of them, for the purpose of advancing fair trade, and of dividing the profits and losses arising from it, proportionally or otherwise, between them." (Bouv. Law Dict., title, Partnership.)

From the above definitions it seems plain that a partnership means at least that each member of the "combination" must share in the losses and profits, proportionately or otherwise. The same may be said of corporations. The members of a corporation must also share the profits and losses of the enterprise, but they are to constitute separate entities, and are to be dealt with as such. The construction of the court below was a strained one, because combinations in restraint of trade have been for centuries recognized by the common law. As an elementary writer puts it: "The rule that contracts that are in restraint of trade shall be void as against public policy is among our most ancient common law inheritances; as early as the second year of Henry V., A. D. 1415, we find by the Year Book that this was considered to be an old and settled law." (Spelling on Trusts and Monopolies, Sec. 4.) Yet during all this period partnerships were legal.

When the legislature declared against combinations and conspiracies in restraint of trade, it must have used the terms in the sense in which they have been understood for so many centuries. The error of the court in holding otherwise is palpable.

The criticism of the Texas statute made by the learned trial court is equally applicable to the Federal statute on the same subject. The Act of Congress passed January 2nd, 1890, says that "every contract, combination in the form of a trust or *otherwise*, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is hereby declared to be illegal."

The Federal statute above noted in the recent case of the United States v. Trans-Missouri Freight Association, was held to apply to all contracts of whatsoever character, that were in restraint of trade, but yet the statute was held valid.

NINTH ASSIGNMENT OF ERROR.

The court erred in holding in effect that the passage of this law did not involve the exercise of a police power of the State, when undertaking to prohibit contracts in restraint of trade, which the experience of generations has proven to be hurtful to the community.

TENTH ASSIGNMENT OF ERROR.

The court erred in holding that the exemption of agricultural products while in the hands of the person producing them, and the exemption of live stock while in the hands of those who raise them, invalidate the statute, because said exemption is such an one as properly addresses itself to the legislative discretion, and was not an arbitrary discrimination in favor of or against any class.

These two assignments of error are so nearly alike that they will be treated together.

Is not the act in question a police regulation?

That it is seems to be too clear for argument. It is difficult to get an accurate definition of the police power of a State. (Stone v. Mississippi, 101 U. S., 814.) No two authors use the same language, or, indeed, give substantially the same definition. Mr. Cooley says:

"The term has been defined as the general power of the government to preserve and promote the public welfare, even at the expense of private rights."

Cooley's Constitutional Limitations, 6 Ed., 624.

Tiedeman's Limitation of Police Power, Sec. 1.

If the public welfare can be best promoted by preventing the character of contracts which this statute seeks to prohibit, certainly it should be classed as a police regulation.

In New Orleans Gas Lighting Co. v. Hart, 40 La. Ann., 474, the term has been defined as follows:

"Police power is the right of State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution."

The following cases also give definitions applicable to the term under review:

Mayor of New York v. Miln, 11 Pet., 139.

Stone v. Mississippi, 101 U. S., 814.

Boston Beer Co. v. Massachusetts, 97 U. S., 25.

Commonwealth v. Alger, 7 Cush, (Mass.,) 84.

Thorpe v. Rutland R. R. Co., 27 Vt., 149.

In defining the term this court has said:

"Every law comes within this description (of police regulations) which concerns the welfare of the whole people of the State, or any individual within it; whether it relates to their rights or their duties; whether it respects them as men or citizens of the State; whether in their public or private relations; whether it relates to the rights of persons or property, of the whole people of a State, or of any individual within it; and whose operation is within the territorial limits of the State, and upon persons and things within its jurisdiction." (Mayor of New York v. Miln, 11 Pet., 139.)

The Supreme court of Maine, has said:

"With the legislature, the maxim of law—*salus populi suprama lex*, should not be disregarded. . . . How far the provisions of a legislative act extend is always submitted to its discretion; provided these acts do not go beyond the great principle of securing the public safety." (State v. Noyes, 47 Me., 211.)

Or, as said by the Supreme court of Illinois:

"The police power of a State is co-extensive with self-protection, and is not inapplicably termed the "law of overruling necessity." It is the inherent and plenary power of the State which enables it to prohibit all things hurtful to the comfort and welfare of society." Lake View v. Rose Hill Cemetery Co., 70 Ill., 192.

The broad scope of the term police power can be as well understood from its illustrations as from definitions. For instance, the public health can be preserved by police regulations in the form of quarantine laws; and in the regulation of the slaughtering of animals.

Slaughter House Cases, 16 Wall., 36.

Butcher's Union etc. Co. v. Cresson City etc. Co. 111 U. S., 146.

New Orleans v. Stafford, 27 La. Ann., 417.
Cooley's Constitutional Limitations, 4 Ed., 506.
State v. Natal, 39 La. Ann., 439.

Such is the right to forbid the adulteration of food products.
State v. Campbell. 64 N. H., 492.
People v. West, 44 Hun., 162.
People v. Aaronsburg, 155 N. Y., 123.
Waterbury v. Newton, 50 N. J. L., 534.

Such is the right to prevent the pollution of water sources.
State v. Wheeler, 44 N. J. L., 88.

It is by the exercise of this power that burial grounds are located and drainage systems inaugurated.
Commonwealth v. Wait, 11 Allen (Mass.), 264.
State v. Campbell, 64 N. H.

It is by the exercise of police power that all acts injurious to public morals are prohibited, such as the sale of injurious drugs, or intoxicating liquors; the sale of obscene books and pictures.
Thompson v. State, 17 Texas Appeal, 253.
Cooley's Constitutional Limitations, 4 Ed., 596.

But it must not be supposed for a moment that the police power of State is exhausted when all matters pertaining to health and morals are properly adjusted. By the exercise of this power all business enterprises may be regulated, so as to best secure the general welfare of the people. Thus all charges made by ferrymen, common carriers, hackmen, bakers, wharfingers, hotels, etc., may be regulated by law under a proper exercise of the police power of the State.
Munn v. Illinois, 94 U. S. 113.
Chicago R. R. Co. v. Iowa, 94 U. S., 155;
Stone v. Wisconsin, 94 U. S., 181.
People v. Budd, 117 N. Y., 1.

It is by this power that the State was permitted to regulate the hours that women and children might labor in manufacturing establishments, and also to provide for the manner in which they should be paid.
Commonwealth v. Hamilton Mfg. Co., 120 Mass., 383.
Shaffer v. Union Mining Co., 55 Md., 74.

Under the exercise of police power, States may regulate the amount of interest that may be charged for the loan of money.

Cooley's Principles of Constitutional Law, 235.

All laws prohibiting the erection of wooden buildings within certain limits in cities, and the regulation of the various kinds of business are police regulations. Indeed, the right to prohibit or license a given calling is recognized as one of the inherent police powers of a State.

Whether the statute in question be tested by definitions or illustrations, it should be conceded to be a police regulation; and if constitutional must be held valid, whether deemed by this court to be wise or unwise. Because a police power can be exercised only by legislative enactment, and it lies solely within the legislative discretion to determine when the public welfare or safety requires its exercise.

Munn v. Illinois, 94 U. S., 113.

Courts are authorized to interfere with the exercise of this police power only when the act in question conflicts with either the State or Federal constitutions.

Munn. v. People, 69 Ill., 93.

Lake View v. Rose Hill Cemetery Co., 70 Ill., 192.

Godard v. Jacksonville, 15 Ill., 588.

Soon Hing v. Crowley, 113 U. S., 703–10.

So long as the legislature does not pass its limit fixed by the constitutions, the courts have no authority to interfere simply because the legislative acts in question are supposed to violate some principle of justice and right.

Tiedeman's Limitations of Police Power, Sec. 24.

Cooley's Constitutional Limitations, 4 Ed., 168.

People v. Toynbee, 2 Park (N. Y.), 329.

Berthoff v. O'Reilly, 74 N. Y., 509.

Albrich v. State, 8 Texas Appeals, 229.

It should also be remembered that the police power of a State may be exercised by an entire or partial prohibition of a particular business regarded as injurious.

Stone v. Mississippi, 101 U. S., 814.

Ex Parte Andrews, 18 Cal., 685.

This leads us to a discussion of the tenth assignment of error.

Is the act in question void because it in express terms exempts from its operation agricultural products while in the hands of the producer, and live stock while in the hands of the raiser?

Remembering the doctrine laid down above, that the legislature in the exercise of a police power may either *partially* or *wholly* prevent the acts which are deemed injurious to the public, it should be held that the exemption in question does not render the statute void. The trial judge fell into an error in the opinion contained in this record by not keeping in mind at all times that the legislature was exercising a police power when it passed this act; and that in the exercise of a police power, it was limited, so far as this court was concerned, only by the fourteenth amendment to the Federal Constitution. That same amendment operated as a limitation on all other powers exercised by the State, as well as the police power. For example, no tax law can be held valid if it conflicts with that amendment. No police regulation can be enforced which fails to conform thereto. The contention that I desire to make clear is that the taxing power of the government, and the police power of the government, are hedged in by the same limitations. The States are not exempt from the operation of the fourteenth amendment in the passage of revenue measures or tax laws; the limitation which permits different rules of taxation for different kinds of property, permits different police regulations for different classes of property, and different kinds of persons. In either case seeming discriminations must be based upon some reason. They must not be arbitrary. That is all that the Federal Constitution requires. That is all that the State Constitution demands when it says that all laws must be equal and uniform. If the reason exists, then this court stops all further inquiry. It has no power to interfere with the legislative discretion although unwisely exercised. Within the limitations of the Constitution the legislature is supreme.

The court below by losing sight of this proposition fell into error. It quoted authorities to support the conclusion reached which had no application to the question in hand.

The statutes which have been held to be invalid as shown by

the decisions relied upon by the court below and appellee may be classified as follows:

1. Those which prescribe rules for the collection of debts for one class of persons different from those applying to all other classes, and which rules are in no sense police regulations.

Frorer v. People, 141 Ill., 171.
Braceville Coal Co. v. People, 147 Ill., 66.
State v. Goodwell, 33 West Va., 179.
State v. Coal and Coke Co., 33 West Va., 188.
Weilder v. Railway Co., 70 Mich.
Railway Co. v. Williams, 49 Ark., 492.
Joliffee v. Brown, 14 Wash. St., 155.
Chair Co. v. Reynolds, 77 Mich. 104.
Railway Co. v. Beatty, 6 Neb., 37.

2. Those which undertake to prescribe regulations amounting to a partial prohibition of some one particular business not in itself contrary to public policy and not injurious to society in any sense, but on the contrary well nigh indispensable.

This class of statutes is illustrated by the one prohibiting bakers, but no others, from baking bread on Sunday, as well as the one prohibiting barbers, but no others, from keeping their places of business open on Sunday.

Raigo v. State, 6 S. W. Rep., 401.
55 Cal., 550.
Edan v. People, 61 Ill., 296.

3. Those which seek to exempt certain individuals or corporations, naming them, from the operation of the ordinary rules of court procedure, or fixing a different rate of interest which they may charge or receive.

Gordon v. Building Assn, 12 Bush., 410.
R. R. Co. v. Moss, 60 Miss., 64.

4. Those which are held void because violative of some limitation imposed by the State Constitution.

State v. Ragio, 6 S. W. Rep., 401.

5. Those which seek to regulate the methods of conducting some kinds of business, which regulations subserve no public good, and for which no good reason can be given. Such as

State v. Coal and Coke Co., 33 West Va., 188.

6. Under the same class to which the above subdivisions belong may be put the case of Pierson v. City of Portland, 69 Maine. 278. To this may be added the case of G. C. & S. F. Railway Co. v. Ellis, 166 U. S. The court there was construing a statute which regulated the method of collecting debts from railroad companies and none others. This court held in that case that the statute was not a police regulation, in that it was not made to appear to this court that there was any law in Texas requiring railroads to be fenced. But in any event, that was immaterial, because the attorneys' fees there authorized to be collected were not limited to damage cases growing out of the failure of the railroad company to observe any police regulation, but applied to all damage cases as well as other indebtedness, hence it could be classed under these cases heretofore mentioned as not applicable to this case, in that no police regulations were involved.

The case of Dibbrell v. Morris Heirs, 15 S. W. Rep., 87-95, cited in Railway Company v. Ellis, does not militate against the position of appellant in this case. It simply announced the doctrine that when a class is exempted from the operation of law, the exemption must be based upon some *reason*, and not be a mere *arbitrary classification*. The language of the distinguished judge delivering the opinion supports the position of the appellant in this case. He said:

"It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this court were arbitrary in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz: *First*, for the purpose of taxation: *second*, for police purposes; *third*, for the necessary protection of the particular class; *fourth*, for the release of a class from some particular obligation or liability."

He then proceeded to give examples under each of the classes named, in which legislation in favor of or against a particular class had been recognized as valid, and not only as valid but absolutely necessary. 15 S. W. Rep., 93. That case supports the contention of appellant in this case.

In this connection, it might be well to advert to the case of Ragio v. State, 6 S. W. Rep., another Tennessee case relied on

by appellee in the court below. In that case the Supreme Court of Tennessee held a statute void because in conflict with the State Constitution, in that it embraced more than one subject, and also because it prohibited no one but barbers from keeping their bath rooms open on Sunday. The article of the State Constitution in reference to the exemption reads as follows:

"The legislature shall have no power to pass any law for the benefit of individuals, inconsistent with the *general law of the land.* Nor to pass any law granting to an individual, or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to *any member of the community* who may be able to bring himself within the provisions of such law." Ragio v. State, 6 S. W. Rep., 401-2.

Similar cases can be easily found, where State statutes have been held void because in conflict with the State Constitution. For instance, it was held in Begg's case, 43 Pa. St., ——, that an act of the legislature permitting a new trial in a single case therein named was void, first, because it was an invasion of the province of the judiciary; second, because it established a different rule for the litigants of that particular case than would be applicable to the litigants of a similar character throughout the State.

So, in the 24th Michigan, an act of the legislature of that State was declared to be void because violative of the State Constitution. The Constitution provided that officers of the State should be elected at *such times* and in such *manner* as the Legislature might direct. That body did not content itself with fixing the time and directing the method in which the officers should be elected, but by an act of its own proceeded to name and elect the officers. 24 Mich., 40.

The Legislature of Wisconsin prescribed that no costs should be recovered against the city of Janesville in any action where the same is commenced to set aside any tax assessment or tax debt, or to prevent the collection of taxes or assessments in said State. The Supreme Court of Wisconsin held that this provision in the charter—the enactment of a special provision dispensing with the general law in *a particular case*, granting to *one* man or corporation, by way of exemption from the operation and effect of a general law, a privilege or indulgence which

no other person or corporation has, is unjust and void. Durkee v. City of Janesville, 28 Wis., 464-5.

It will be noted that in that case the act under review was one regulating the method of assessment of cost in litigated cases, and an exception to the general rule was sought to be made by statute in favor of one particular litigant.

It was akin to the decision in a Tennessee case which construed an act of the Tennessee Legislature. The legislature had provided that the officers, agents or servants of a particular banking corporation should be guilty of crime if they embezzle or appropriate, without authority, funds of the corporation. It was held void because it did not embrace all persons in like state, and surrounded *by like circumstances.* Budd v. State, 3 Humph., 483.

An act was passed by the Wisconsin Legislature preventing the erection of certain improvements at a certain point, naming it. It was held void because it deprived the riparian owners of their rights to use their property, without due process of law, and because it was an assumption of judicial power on the part of the legislature of the State. It was therefore violative of the State Constitution as well as the Federal. City of Janesville v. Carpenter, 77 Wis., 284.

It was held in Michigan that a newspaper had no more right to circulate libelous matter than private individuals. That position seems to be sound. Park v. Free Press, 72 Mich., 360.

An act imposing liability on railroad companies for damages done without giving them the right of judicial ascertainment, was held void by the Supreme Court of Alabama. R. R. Co. v. Morris, 65 Ala., 194. That is not applicable to this case.

On the other hand, however, an act making a different statute of limitations for railroad companies than is applicable for other parties, has been held valid, and in the same case. 65 Ala., 194.

In California, a Sunday law which forbid bakers to bake bread on Sunday, while permitting all other persons so to do, was held void, because applied to bakers only. The Supreme Court of California could find no good reason why a baker should not cook his breakfast on Sunday as well as any other person. He was compelled to eat on that day the same as other

people. That act seemed, therefore, to overstep the boundaries of police regulations. That case is easily distinguishable from this. 55 Cal., 550.

On the other hand, an ordinance exempting drug stores and livery stables from the operation of the Sunday law was said to be valid. But one exempting Jews therefrom was held void, because no race or religion is recognized in law, while the existence of the different occupations would be readily recognized. Shrevesport v. Levy, 26 La. Ann., 671.

An Illinois statute which forbid barbers, and barbers only, to keep open their shops or work at their trade on Sunday, for a similar reason, was held to be void. Eden v. People, 61 Ill., 296.

A special act of the Kentucky legislature, allowing a building and loan association to charge a greater rate of interest than was allowed any other citizen of Kentucky, was held void. Gordon v. Blg. Assn., 12 Bush., 410. That was not a police regulation, but was a special privilege arbitrarily granted to one association only.

An act of the Mississippi Legislature, which made the terms upon which corporations might appeal from decisions in favor of the citizens of Mississippi more onerous than those applicable to citizens of other States, was held void. How it could have been otherwise is difficult to understand. R. R. Co. v. Moss, 60 Miss., 64.

Counsel for appellee, in their brief, which they have injected into the record, and thereby compelled the appellant to print, rely upon the case of James v. Reynolds, 2 Texas, 252, to show that this statute was void. In that a very different principle applied. It was there held that a statute authorizing a summary judgment against obligors on a bond must be strictly complied with before such a judgment could be entered. In other words, the bond should not be more onerous than the statute provided. But it was also held that if the bond conformed to the statute it would be valid, and that a summary judgment might be entered.

The same doctrine was announced in Hanks v. Horton, 5 Texas, 103; Harris v. Shackleford, 6 Texas, 133. Indeed that is the settled law of Texas. But that question is not involved in this case.

In Michigan another statute was passed authorizing the taxing of an attorney's fee of $25 in actions against railway companies for damages for cattle killed, but the Supreme Court of that State held the statute unconstitutional, because applicable to railway companies only. It will be noted that that was not an act of police regulation, but it was an effort to apply a different doctrine to a railroad company in respect to the payment of their debts than was applicable to other persons, utterly dissimilar to this case. Weilder v. Ry. Co., 70 Mich. That was like the Ellis case.

In Arkansas a similar statute was held invalid, Ry. Co. v. Williams, 49 Ark., 492.

But in Dowe v. Beidleman, 49 Ark., 455, another statute of that State, allowing attorney's fees in actions for the recovery of overcharges against railways, was held valid. The reason of that was that that was a penalty for the violation of a necessary police regulation of the State, the fixing of maximum freight and passenger rates.

The case of Joliffee v. Brown, decided by the Supreme Court of Washington, (14 Wash. St. 155) as well as in Chair Company v. Runnels, (77 Mich., 104,) is in accord with the case of Railway v. Williams, and the Michigan cases above cited. In each of these cases the statutes were held void for the same reason—that they simply regulated the collection of debts—and were not police regulations.

For a like reason a statute which arbitrarily provided that the owner of live stock accidentally killed or destroyed on a railway track might recover double its value, was held to be invalid. Ry. Co. v. Baty, 6 Neb., 37.

An act of the Illinois Legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner was held to be arbitrary, because no reason for the existence of that law could be found, particularly as it was applicable to none others than the owners and operators of coal mines. Millett v. People, 117 Ill., 294.

Another Illinois statute which prohibited people in the mining or manufacturing business from keeping stores to furnish supplies to their employees was held invalid as an unnecessary

and arbitrary restriction against people engaged in that business. Frorer v. People, 141 Ill., 171.

Another statute requiring certain corporations to pay their employees weekly was held to be void, because no reason could be given for making the discrimination or distinction. Braceville Coal Co. v. People, 147 Ill., 66.

In West Virginia, a statute preventing miners and manufacturers from issuing any paper except such as was specified in the act, to their laborers in payment of what was due them, was held to be void. State v. Goodwell, 33 West Va.. 179.

In the case of the State v. Coal and Coke Co., 33 W. Va., 188, the court held that a statute which prevented an employer from selling to his employes at a greater per cent. of profit than he sells to others not employed by him, was unconstitutional and void. The reasons given in that case were that it was too restrictive, and made no exceptions in cases of charity or kindred. It was believed to be an unnecessary discrimination against those who happened to be engaged in mining and manufacturing, while it applied to no other persons. But the Supreme court of Maryland holds such statutes valid. Shoffi v. Mining Co., 55 Md., 74.

In Maine a statute was passed providing that persons injured by defective sidewalks or highways could not recover of the city or town responsible for the injury unless he could show that at the time the damage was done, that in the country in which he resided damages could be recovered under similar circumstances. That was plainly in conflict with the fourteenth amendment, because it made the individual's rights under the statute depend on the particular local law of the country in which he happened to reside. Pearson v. City of Portland, 69 Me., 278.

Cases from other states have been cited by the appellse, but they, together with those herein reviewed, are based upon statutes easily distinguished from the one under consideration.

Plainly all of the statutes reviewed in the authorities above mentioned are utterly dissimilar to the one which the court is asked in this case to construe. All of the cases cited cannot be entirely reconciled,—and I do not approve all that they decide; nor do I believe all of them are sound, but none of them pro-

perly interpreted militiate against appellant's contention in this case.

In addition to the cases above noted, several decisions of this court have been cited in support of the proposition that the statute in question is void. The case of Yick Wo v. Hopkins, 118 U. S., 956, is relied on by counsel for appellee. The ordinance in that case was held to be void because it conferred upon the municipal authorities arbitrary power at their own will, and without reference to legal discretion, to refuse consent as to persons or places, without regard to the competency of the person applying, or the territory or places selected, for the carrying on of the business of public laundries. This holding was justified on another ground—that the municipal authorities whose duties it was to administer the ordinance, applied it so as to make unjust and arbitrary discriminations against the Chinese. That case, of course, has no application to this. It was objectionable for two reasons: 1. It permitted arbitrary discriminations to be made against persons and places. 2. As executed it made a race discrimination against the Chinese.

Other cases have been cited to this court where state statutes which arbitrarily exclude colored men from a jury have been held to be void. They are not in point.

As before stated I do not mean to indorse all of the decisions upon which counsel for the appellee rely. But my contention is that they are inapplicable here because the statute now under consideration falls within none of the classes which these cases discuss and determine.

1. It does not prescribe any rules for the collection of debts.

2. It does not undertake to prescribe regulations amounting to a prohibition of some one particular kind of business which does not injuriously affect society.

3. It seeks to prescribe no different legal remedy for one class of citizens than that open to other classes similarly situated.

4. It does not violate the Constitution of the State.

5. It gives no race any advantage over any other race.

6. It is not an unreasonable discrimination against any one class or business, as will be hereafter shown.

It is submitted, therefore, that the decisions relied upon by appellee have no application to this case.

This leads us to a consideration of other cases which support the contention of appellant here made, and the reasons upon which these cases are based. In this connection it should be remembered that there is nothing in the proposition made by the court below that the statute in question does not apply to but a small percentage of the population of the people of Texas. That it applies to only certain classes, and that there are certain classes of people to whom it does not apply is immaterial. A large part of the legislation of the entire country is "class" legislation; that is to say, it is limited to some particular class of citizens or subjects. But it is not for that reason invalid. The question as to the number of people, or the amount of property to which a law applies has nothing to do with its validity. The court will not inquire what proportion of the people will be affected by the law. It will ascertain whether there was reason for the discrimination made, but beyond this it will not go. This court has wisely said:

"The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory in which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. Hays v. Missouri, 120 U. S., 111-2.

The following cases support and illustrate the proposition there made.

City Railway Tax case, 92 U. S., 912.
Kentucky Tax case, 115 U. S., 578.
Pacific Express Co. v. Seibert, 142 U. S., 339.
Natal v. Louisiana, 139 U. S., 621.
Crowley v. Christensen, 137 U. S., 87.
Kidd v. Pierson, 128 U. S., 1.
C. B. & Q. Ry. v. Iowa, 94 U. S., 155.
Mugge v. Kansas, 123 U. S., 623.
Minn. Ry. Co. v. Beckwith, 129 U. S., 26.
Home Insurance Co. v. N. Y., 134 U. S., 594.
Giozza v. Tiernan, 148 U. S., 662.

Railway Co. v. Macay, 127 U. S., 205.
In re Kemler, 136 U. S., 436.
Railway Co. v. Humes, 115 U. S., 512.
Barbior v. Connollee, 113 U. S., 27.
Soon Hing v. Crowley; 113 U. S., 708–9.
R. R. Co. v. Gibbs, 142 U. S., 386.

The same rule has been recognized by the Supreme Courts of the various States of the American Union. Southerland on Stat. Cons., Secs. 125–6–7, and authorities there cited.

This rule is recognized in that line of authorities which held that any State in the American Union might prevent foreign corporations from establishing offices within its limits until the taxes required by its laws to be paid have been collected.

Pemb. Mfg. Co. v. Penn., 125 U. S., 183.
Paine v. Va., 8 Wall., 168.
Bank v. Earle, 13 Pet., 519.
La. Ins. Co. v. French, 8 How., 404.
D. v. Chicago, 10 Wall., 410.
St. Clair v. Cox, 106 U. S., 350.
Ph. F. Assn. v. N. Y., 119 U. S., 110–20.
Missouri v. Lewis, 101 U. S., 22–30.
Hays v. Mo., 120 U. S., 68.

Statutes regulating liquor dealer's licenses, although applied to a very small percentage of the population of each State, have been held valid.

Giozza v. Tiernan. 148 U. S., 662.
Crowley v. Christensen, 137 U. S., 87.
Kidd v. Pierson, 128 U. S., 1.
Mugg v. Kansas, 123 U. S., 623.

A New York statute requiring electric railways to file maps of their proposed route with a board of commissioners, and to pay the expenses of the board in the examination of the road and maps, was held valid. It was declared to be a necessary exercise of police power, although it applied to no other class of railroads, and but a small percentage of the people in that great metropolis.

New York v. Squire, 145 U. S., 175.

A South Carolina statute requiring railroads of the State to pay the salaries and expenses of the State Railway Commission was held valid by this court, as a necessary police regulation. Yet that statute was limited in its application to railroad property. No other class of property except railroads was compelled to bear that burden.

Railway Co. v. Gibbs, 142 U. S., 386.

Laws making the rule for the assessment of taxes on railroad property different from other property have been upheld by this court.

City Ry. Tax case, 97 U. S., 576.

Ky. Tax cases, 115 U. S., 321–37.

In the case last cited, the court said:

"The whole matter is left to the discretion of the legislative power (meaning the matter of taxation) and there is nothing to forbid the classification of property for the purpose of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same kinds and methods to be applied impartially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. *The different nature and uses of their property justify the discrimination in this respect* which the discretion of the legislature has seen fit to impose. (Italics mine.) 115 U. S., 337.

This doctrine is also illustrated in the following cases:

Bells Gap Ry. Co. v. Pa., 124 U. S., 232-7.

Home Ins. Co. v. New York, 134 U. S., 594-607.

Pacific Express Co. v. Seibert, 142 U. S., 339-51.

The cases above cited show the operation of the fourteenth amendment on the States in the exercise of their taxing power. Many other cases might be cited to the same effect, but these will suffice. They make plain the fact that this court has never held that the fourteenth amendment prevented the States from discriminating in their tax laws against certain classes. It is understood and clearly understood that there are abundant reasons why some classes of property should be taxed by different rules from other classes. The only proposition which this court has maintained in that connection is that there must be some *reason*

for the classification of property and for the application of different rules to different classes. In other words, the legislatures may not *arbitrarily* discriminate against any class. But if the reasons for the discrimination exists the inquiry ends. A large measure of discretion is vested in the legislatures. Courts must recognize that few human laws are exactly just, and that in these different classifications of property absolute justice and equality is unattainable. To approximate justice is all that should be expected the most exacting.

The same rule has been announced by this court in reference to police regulations. Police regulations have been upheld that have applied to but one kind of property. For instance, as above shown, this court has frequently upheld statutes regulating the liquor traffic. In Giozza v. Tiernan, above cited, a Texas statute imposing a very much higher license on a liquor dealer than on any other class of merchants was held to be valid. Literally is discriminated against liquor merchants. A larger tax was necessary for the privilege of selling whiskey than for the privilege of selling the same value of dry goods. But this court held that there was sufficient reason for the discrimination. The statute was therefore held valid.

It was also held by this court that a State statute compelling railway corporations to pay double the amount of the value of stock killed by its cars or engines on an unfenced railroad, where the statute required it to be fenced, was valid.

Missouri Pacific Ry. Co. v. Humes, 115 U. S., 512.

But that statute did not make the owner of unfenced lands responsible for double the value of stock killed thereon. The statute was upheld because of the difference in the circumstances surrounding the owner of the unfenced lands, and the owner of the railroad.

The same doctrine is announced in Minn. Ry. Co. v. Beckwith, 120 U. S., 26, and in Ry. Co. v. Macay; 127 U. S., 205.

The State courts are in accord with that view of the question.

Welsh v. R. R. Co., 53 Iowa, 632-4.

Bennett v. Ry. Co., 61 Iowa, 355-66.

Dowe v. Beidelman, 49 Ark., 492.

The case of the Railway Co. v. Ellis, heretofore alluded to, does not conflict with the cases above cited. That case, as be-

fore shown, was based upon a statute which was not a police regulation at all, nor was it made to enforce a police regulation. Whereas, in the case last above cited, the statute therein construed was made to enforce a police regulation, and was hence valid.

A similar statute discriminating against certain classes of business was upheld by this court in the laundry cases.

Barbior v. Connollee, 113 U. S., 27.

Soon Hing v. Crowley, 113 U. S., 709.

Why? Because there were reasons why these regulations should be enforced against laundries, yet the regulations were unnecessary for any other kind of business.

The Supreme court of New Hampshire in the case of the State v. Marshall, 64 N. H., 549, recognized this distinction.

The Supreme court of Maryland has upheld a statute requiring all oleomargarine sold to be stamped as such, yet no such requirement was made as to other commodities.

Pierce v. State, 63 Md., 532.

A statute prohibiting the manufacture and sale of oleomargarine, or the manufacture of the same with the intent to sell, was held valid; and the fact that oleomargarine when pure may be wholesome was immaterial.

Powell v. Commonwealth, 114 Pa. St., 265.

127 U. S., 679.

In Massachusetts and New Hampshire the sale of watered milk has been forbidden by statute, and the statute upheld, though the water was pure.

Commonwealth v. Waite, 11 Allen, 264.

State v. Campbell, 64 N. H.. 402.

Laws requiring separate coaches for white and colored passengers have been upheld.

R. R. Co. v. State, 66 Miss., 662.

133 U. S., 587.

Laws requiring separate schools for white and colored children have been upheld.

Leehew v. Brummel, 15 S. W. Rep., 765.

People v. Gallagher, 93 N. Y., 438.

Dawson v. Lee, 83 Ky., 49.

Roberts v. Boston, 5 Cushing, 198.

A statute prohibiting the sale or transportation of cotton by night within certain counties has been held valid.

Mangin v. State, 76 Ala.

Davis v. State, 68 Ala.

The above citations of authority have been made for the purpose of illustrating the application of the rules herein contended for, viz.: That the fourteenth amendment to the Federal Constitution requires the same uniformity in tax laws that it does in police regulations. It should also be remembered that the taxing power and the power to regulate are frequently one and the same. The police regulations and the power to tax are more nearly allied than any other two powers of government. It depends altogether on what is the purpose of an occupation tax as to whether it is regarded as a revenue measure or a police regulation.

Cooley on Taxation, 1st Ed., Chapter 19, pp. 396 and 397.

Bearing in mind this similarity, it will not then be difficult to understand that the Legislature of Texas, in passing the anti-trust law with the exemption, which rendered it inapplicable to agricultural products in the hands of the man who produced them, or live stock in the hands of those who raised them, made no new departure from the fixed policy of the State. The court below intimated in the opinion, which is brought up in the record, that the Texas Legislature was actuated by some sinister purpose, some desire to pander to the agricultural classes in the exemption under consideration. The fact that he was a non-resident of the State and unacquainted with Texas is doubtless his excuse for falling into this error. Texas came into the Union in 1845 with a Constitution of her own making, which was acceptable to the American Congress in every essential particular. That contained an exemption. Section 27, article 7, reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession: provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical." (Sayles' Texas Statutes, Vol. 4, p. 211.)

It will be noted that in this case uniformity of taxation was demanded, just as the fourteenth amendment demands, that "no law shall be passed by any State which will deny to any person within its jurisdiction the equal protection of the laws." The legislative discretion, however, to exempt certain classes of property from taxation was recognized, but the agriculturalist was entirely exempted from the payment of any occupation tax. In 1861 Texas undertook to secede from the Union. The convention, declaring for secession, framed a new Constitution, in which they embodied section 27, article 7, of the Constitution of 1845. It reads as follows:

"Section 27. Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exexempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, p. 247.

In 1866 another Constitution was framed. Article 7, section 27, of that instrument was made again to read as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, bottom of page 322.

In 1869, what was known as the Reconstruction Constitution of Texas, was adopted. Section 19, article 12, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in the State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have the power to levy an income tax and to tax all persons pursuing any occupation, trade or profession; pro-

vided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, p. 461.

Dissatisfied with this Constitution, the people of Texas, in 1875, made another in its stead, which was adopted in 1876, and is therefore called the Constitution of 1876. Section 1, article 8, of that instrument, so far as applicable, reads as follows:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation." Sayles' Texas Statutes, Vol. 4, bottom of page 557 and top of page 558.

Section 2, article 8, provides also that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void." Sayles' Texas Statutes, Vol. 4, top of page 559.

It will thus be seen that the court below was mistaken in assuming that the Texas Legislature in 1889 was inspired by the sinister purpose of pandering to the agricultural classes of that State. On the contrary, they were but following the beaten path marked out for them by the fathers nearly half a century before. They were but pursuing the fixed policy of Texas as outlined in every Constitution which its people had adopted from the date of the admission of that State into the Union. And another significant feature is that the first Constitution of Texas was adopted by the people who won its independence; the second Constitution was adopted by the people who sought to

secede and dissolve the Union; the third Constitution, of 1866, was adopted by those who, under the policy of President Johnson, sought to restore the State to its practical relations with the Union; the fourth Constitution was framed by those who under what is known as the "reconstruction laws of Congress" established a government; the fifth and last was made in 1876, when the Democratic party was again restored to power. I mention these facts for this purpose only, viz: to show that no matter what political party was in power in Texas—whether it was the revolutionists who had established its independence; whether it was the secessionists who sought to take it out of the Union; whether it was the followers of President Johnson who sought to establish it again in the Union; or whether it was the Republican party in the reconstruction days, or the Democrats just regaining their lost power, each of their Constitutions carried with it and in it the provision exempting the agriculturist from the payment of an occupation tax.

The provision of the Constitution of 1869, above quoted, was construed by the Supreme Court of our State, but it never occurred to the learned jurists then on that bench that the exemption was unconstitutional.

See Higgins v. Winkler, 47 Tex., pp. 383, 395.

This decision has been followed by the Court of Criminal Appeals of Texas in numerous cases.

Harris v. State, 4 App., 131.
Tonado v. State, 4 App., 325.
Langbell v. State, 4 App., 312.
Ex Parte Cooper, 3 App., 489.
Ex Parte Mabry, 5 App., 93.
Albrecht v. State, 8 App., 216.

In the last mentioned case Judge Clark in an admirable opinion maintained the law imposing an occupation tax on retail liquor dealers as constitutional. The portion of his opinion bearing upon this subject reads as follows:

"The class of subjects proposed to be taxed were retail dealers in spirituous, vinous or malt liquors, and the provisions of the law are made to apply to all such dealers within the limits of the authority levying the tax. That more money may be collected from one dealer than another does not destroy the equality or uniformity of the sys-

tem, within the meaning of the Constitution, but the tendency and effect is decidedly to the contrary. 'Perfect equality and uniform taxation will remain an unattainable good as long as laws and government and man are imperfect.' Approximation to this is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a tax is just and equal or not, is not a question of law. If it were, courts, by adopting a standard of rigid construction, might altogether put a stop to taxation; for no system ever devised, whether it related to a tax on property or on business, or a capitation tax, ever in its practical operations bore equally and uniformly on the same class of subjects. If there is such equality and uniformity as conforms to the standard provided in the Constitution, or reasonably deducible from it, it is all that can be required. Texas Banking and Insurance Company v. State, 42 Texas, 639; Youngblood v. Sexton, 32 Mich., 414; Cooley on Taxation, 124-127. Viewed in its twofold aspect, the law in question is free from objection on this account." Albrecht v. State, 8 App., 228.

It will be seen from the excerpts taken from the opinion, that the distinguished jurist speaking for the court, did not seem to understand that the provision in the Texas Constitution exempting agriculturalists from the operation of the occupation tax laws rendered all occupation taxes void, because taxes were not thereby uniform, and because it denied to some people the equal protection of the laws. Yet it must be clear to any mind that if the exemption of the agriculturalist from the payment of an occupation tax did not deny to those who were compelled to pay occupation taxes the equal protection of the laws, certainly the exemption of the agricultural classes from the police regulation contained in the anti-trust law cannot have that effect. It would be no credit to our State courts, either the Supreme Court or the Court of Appeals, to suppose for a minute that the Federal Constitution was forgotten, but whether it was or not, the provision in the State Constitution requiring all occupation taxes to be equal and uniform—that is, uniform as to the same classes upon which they operate—is precisely in accord with the construction which this court has given to the fourteenth amendment to the Federal Constitution. In Giozza v. Tiernan, this court also failed to find any objection to the occupation tax on whiskey dealers, although the occupation tax on whiskey dealers is regarded in part as a police regulation.

Giozza v. Tiernan, 148 U. S., 662.

From an examination of the authorities last above cited, it will be seen that the argument that the exemption of agriculturalists from the operation of the anti-trust law will render it invalid, has at least, the merit of novelty. It never suggested itself to the Supreme Court of Texas, nor to the Court of Appeals of Texas, notwithstanding the learning of the members of that court. It never suggested itself to this court when considering the several occupation tax cases brought here from the Texas courts. I have said that the exemption of this statute relates almost exclusively to agriculturalists; that is to say, to the producer of agricultural products, and to those who raise live stock. Although the western part of Texas is perhaps more adapted to stock raising than to farming, yet the fact remains that the larger portion of the live stock in Texas is owned by the farmers, and is raised by the farmers. This fact was brought out most clearly in 1884 by Judge Terrell, of our State, then State Senator, and recently Minister to Turkey, in a speech in the State Senate then printed.

Bearing in mind the purpose that the legislature had in view in passing this act it will not be difficult to understand why the exemption in question was made. Our Supreme Court in a well considered opinion, discussing the question of intention of the legislature in passing the act, was led to consider the following cases:

People v. North River Sugar Refining Co., 121 N. Y., 581.
State v. Cotton Seed Oil Trust, 40 La. Ann., 8.
Richardson v. Buhl, 6 Law Rep. Ann., 457.
People v. Chicago Gas Trust Co., 130 Ill., 268.
Rice v. Rockefeller, 8 Ry. and Corpt. Law Journal, 129.
Gould v. Head, 38 Federal Rep., 886.
State v. Nebraska Distilling Co., 8 Ry. and Corp. Law Journal, 23.
Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173.
Arnot v. Coal Co., 68 N. Y., 558.
Santa Clara V. M. & L. Co. v. Hays, 76 Cal., 387.
Clancy v. Onondega Salt Co., 62 Barb., 395.
Craft v. McConoughy, 79 Ill., 346.
India Bagging Co. v. Kock, 14 La. Ann., 168.
Gibbs v. Baltimore Gas Co., 130 U. S., 396.

Texas Oil Co. v. Adoue, 83 Texas, 650.
Anderson v. Jett, 89 Ky., 375.

Referring to them the court said:

"The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the legislatures of several States sought to remedy by direct statutory enactments upon the subject. They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce, or the rates of transportation and intercommunication. The evils resulting from these operations were doubtless paramount in the minds of our legislators when they passed the statute under consideration, and it was to repress these practices that the law was enacted. By the 'plain import of its language' it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles." Ins. Co. v. State, 86 Texas.

It is always conceded that the interpretation given by the Supreme Court to a statute of its own State is binding on all other courts, in so far as the question of legislative intent is involved. (134 U. S.) It would seem, therefore, that the statement of the Supreme Court of Texas given on that point is conclusive. Bearing this in mind, it is clear that the purpose of the legislature was to protect the people of Texas against the combinations of capital who had obtained control of those commodities without which the community could not exist. To illustrate: The sugar trust was able to control the price of sugar. The oil trust was able to control the price of oil. The coal trust was able to fix the price of coal. The cattle trust, formed in New York, was able to fix the price of meat, especially beef. The gas trust could determine the price at which cities should be lighted. Cotton bagging trusts fixed the prices which farmers must pay for bagging in which to wrap their cotton. Indeed, everything was believed to be, and most commodities were, in the hands of combinations of capital, which were able to strike down all competition and control the entire Texas market. It must be remembered, too, that these trusts do not sell directly to the consumers. They do not retail out the food products, oils, coal, clothing, and other articles of prime necessity to the consumer, but the trusts sell to the dealers and the dealers sell to the consumers. It is well known that

the farmers and agriculturalists sell very little direct to the consumers. They sell their grain to the mills; their pork to the packery; their cattle to the cattle dealer, who in turn sells them in a foreign market. Their cotton is shipped to the mills of New England or Europe; their wool is likewise carried to the same place, and the food products, when thoroughly prepared for consumption, are returned to dealers who in turn sell to the consumers of the State. The same may be said of the finished manufactured products made out of raw material raised in Texas, sold to the factories by the agriculturalists and stockmen. It is plain, therefore, from the foregoing, that the agriculturalists and stock raisers of Texas, from the very nature and character of their business, are incapable of entering into agreements in restraint of trade, which would be injurious to the people of Texas: that is to say, inasmuch as the sales of their products are not made to the consumers but mainly to speculators and to dealers, who in turn sell them to people outside of the State, that no agreement that they would make would be hurtful to the people of Texas. Another fact, which the legislature doubtless had in mind, and which is known to all persons reasonably well informed, is that the farmers and stockmen of Texas cannot make and execute an agreement which would injuriously affect the people of Texas. Let it be granted, for the sake of argument, that they sell to the consumers (which they do not), it is well known that they are compelled to sell the products of their fields as soon as they can be reasonably prepared for market. They are compelled to sell their live stock as soon as they are old enough for market. The sale of the products of the farm and the live stock becomes a matter of prime necessity to them in order to pay the debts which they incur in the cultivation of their fields, and in order to enable them to procure supplies for the ensuing year. This condition is not peculiar to Texas. It is true of every agricultural section of country where there are no mines that are being operated, and few or no factories in existence.

The suggestion of the distinguished trial judge that there were such things in existence as swine breeders' associations, and farmers' alliances is without force. The legislature was not intending to prevent the existence of organizations of any kind,

but it was intending to prohibit contracts made by organizations and individuals which would operate in restraint of trade. What did it avail the distinguished trial judge to call attention to swine breeders' associations, farmers' alliances, or cattle raisers' associations unless he could show that the swine breeders' association undertook to control the price of pork, the cattle raisers' association the price of beef, or the farmers' alliance undertook to control the price of farm products. I presume he knew what everybody else knows, that no such effort has ever been made, and if made has proven abortive. Take for example the efforts that the Southern farmers made to restrict the number of acres planted in cotton. What was the result? The result has been, in every instance, to increase the acreage rather than to reduce it. Suppose that the farmers of the great West—the grain fields—have entered into agreements (which I deny) to fix the price of the products of their farms. Have they ever been able to execute them? Were such agreements ever made and executed by the farmers of the Northwest or of the middle West? The answer of every intelligent American citizen must be "No, they have never been able to execute any such agreement."

I repeat that it was not the purpose of the Texas Legislature to prevent farmers from organizing, stock men from organizing, swine breeders from organizing, nor lawyers from organizing. The distinguished jurist might as well have pointed to the Texas Bar Association, or the Texas Medical Association. It would have been just as pertinent to the issue. I repeat, the existence of farmers' alliances, of swine breeders' associations, of cattle raisers' associations, does not prove that they were undertaking to control the markets, or that there was any danger of their ever succeeding in controlling the markets, and therefore there was no necessity for the legislative enactment to include them. The idea of the Texas farmers controlling the price of a single farm product by agreement among themselves or with others is absurd. The idea of their undertaking to control the price of beef or pork is equally absurd. Every one knows that it is impossible for them to do it. Every one knows that they have never undertaken to do it, and if they were to undertake it they would make a most ridiculous failure. Competition between them renders it impossible. Their financial

condition is an unsurmountable obstacle to their successful control of these questions. Legislation becomes unnecessary, because it is useless to attempt to prohibit that which is impossible. But it is not so with dealers, as hereinbefore stated. They buy almost everything that the people of Texas consume from merchants and manufacturers controlled by trusts. The trusts that sell to them make two forms of contracts—sometimes they are blended in one.

1. They bind those who purchase from them to purchase exclusively from them.

2. They enter into agreements with the Texas dealers fixing the prices at which the Texas dealers will sell those commodities to their customers, and thus deprive the Texas merchant of the advantage of competitive dealers from whom he might purchase, and depriving the Texas consumer of advantages of competitive prices among Texas merchants. This is shown by the several Texas cases cited in this argument. It was proven, indeed it was admitted by the Waters Pierce Oil Company, in a trial recently had in the District Court of Travis County, Texas, between the State of Texas and that company, in which the permit of the Waters Pierce Oil Company (a foreign corporation), to do business in Texas was cancelled by the court, that the first class of agreements above mentioned had been entered into by it and the Texas dealers.

1. That the Waters Pierce Oil Company bound their customers to buy from them only. They were not permitted to buy from the Standard Oil Company of Ohio, or New Jersey, or any other oil company. They contracted away their right so to do.

2. It was proven in numbers of instances that they entered into contracts fixing the price of oils at which the Texas merchant should sell to his customers. The same distinguished counsel represents the Waters Pierce Oil Company in that case that represents appelles in this court, and they know the statements herein contained on this point are absolutely correct. Furthermore, it was proven in that case that the Waters Pierce Oil Company had entered into an agreement with various oil companies, which composed the Standard Oil Trust, and that no other company in what was known as the Standard Oil Trust competed with the

Waters Pierce Oil Company in Texas in the sale of illuminating oils. That much was admitted on the trial. The result was they destroyed all competition, because the trusts having fixed the prices the merchant must sell at those prices so fixed or else they cannot purchase from outside dealers. Or if they did not fix the selling price they had obligated themselves to purchase from no one except their vendors, thus bargaining away their right to buy their supplies in competitive markets. This is known to be true. This makes plain the purpose of the legislature in passing this law. It was to prevent this destruction of competition that the Texas statute was passed, and therefore it was not necessary to include within its terms any except those who were dealers, because if the dealers could be kept from entering into agreements in restraint of trade with the trusts from which they purchased, competition would be preserved in Texas and the individualism of the citizen would not be destroyed. This being the object and purpose of the legislature it would have been absurd and certainly unnecessary to have included the agricultural products while in the hands of the producer, and the live stock in the hands of the raiser, within the terms of the statute. It would have done no harm to have so included it, but it certainly would have done no good. But the moment these commodities become the property of a dealer, whether that dealer be a farmer or a merchant, the law applies to them. There was abundant reason for the discrimination. It was not arbitrary.

Because it was unnecessary, the remedial legislation is never called for except for the purpose of correcting existing evils, and there is no necessity for including within remedial legislation acts which are of themselves innocent, unless by leaving out those innocent acts it renders it impossible to prohibit the acts that are themselves hurtful. That was doubtless the reason why the terms of the act were made so comprehensive as to all matters not specifically exempted therefrom. Like the Federal statute, it related to all agreements, reasonable and unreasonable alike, because it is difficult to discriminate under existing conditions as to the contracts made in restraint of trade by dealers. They might make some that were harmless and others that were hurtful, but in opening the doors to permit harmless agreements to be made by dealers the danger was believed to be that it

would render it impossible to prevent the hurtful ones from being likewise consummated.

I submit, therefore, that the exemption can be maintained on the following grounds:

1. Because the object and purpose of the law was to prevent the Texas dealers, who supplied the masses of the people with the necessaries of life, from making contracts with trusts from which they purchased them, fixing the prices at which they should sell to their customers, or restricting them in their right of purchasing from others. In other words, the purpose of the statute was to compel the Texas dealers to sell at prices which they themselves would control, and thus secure competition to those who purchased from them, and to prevent their agreeing to restrict their right to purchase so as to secure competitive markets in which they might buy, and thus give the consumers at least the benefit of the competition in and out of Texas. The farmers not selling directly to the consumers but to dealers did not come within the reason of the rule.

2. Because the farmers of Texas were powerless and are still powerless to make and execute any agreement in restraint of trade in respect to products raised by themselves that would be hurtful to society.

Instead of being criticised for having passed this law the legislature ought to receive the commendation of all men who believe that the individualism of the citizen ought to be preserved and that competition in business ought not to be destroyed. The Supreme Court of Texas has taken this view of this question more than once. It has declared and repeatedly declared that this statute is constitutional.

Insurance Company v. State, 86 Texas.

Houk & Dieter v. Brewing Association, 88 Texas, 184-189.

Coal Company v. Lawson, 34 S. W. Rep. 919.

Brewing Company v. Templeman, 38 S. W. Rep., 27.

Fuqua v. Pabst Brewing Company, 38 S. W. Rep. 30.

The Supreme Court of Texas is cognizant of the conditions which existed there in 1889, and which still exist. The court is composed of judges who have spent the greater part of their lives in that State. If they believed that the discrimination in this statute was an arbitrary one and was without reason, un-

questionably they would have held the statute invalid. I do not mean to say that their conclusion upon that point should be conclusive in this court. I know that the contrary is true. But what I do mean to say is this, that every statute is presumed to be valid until the contrary is shown beyond a reasonable doubt. That is an elementary rule always recognized. That rule would be applied by this court if the statute in question had never been reviewed by the Supreme court of Texas. It seems to me that that presumption should be strenghtened in this case because the Supreme Court of that State, each of whose judges is cognizant of the conditions therein, have repeatedly held this statute valid.

The exemption of farm products in the hands of the producer and live stock in the hands of those who raised them from the operation of the law does not render it invalid, because the exemption is based on a sufficient reason and is in no sense arbitrary.

It is hardly necessary to call the attention of the court to another suggestion made by the trial judge in his opinion that the statute in question sought to give the courts of Texas extra territorial jurisdiction. He based his opinion on section 5 of the act. It reads as follows:

"Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

Manifestly the court did not discriminate in the construction of this section. It did not intend to authorize the courts of Texas to take cognizance of any offenses *committed outside of Texas;* but it did seek to give the State jurisdiction of *offenses committed in Texas* by people actually *outside* of her limits. That is no new law. It has always been recognized that a man's personal presence in a particular locality is never necessary to constitute him a criminal therein. It never becomes material to inquire where he was when he committed the crime. The important question is, *where was the crime committed?* As to whether he accused was within the limits of the State or not is

immaterial and never could be material in any case except where an extradition is sought; then it might be that no requisition could issue from one State unless the party was personally present in the State where the crime was committed and had fled from it, or had been in the State subsequent to the commission of the crime and had fled from it, but even then it is unimportant whether he was in the State at the date when the crime was committed or not, provided he committed it.

Ex Parte Reggell, 114 U. S.

Criminal Law Magazine, Vol. 3. p. 804.

Am. and Eng. Ency. of Law, Vol. 7, pp. 645, 646, subdivision 22, and authorities there cited.

Moore on Extradition, Vol. 2, Secs. 578-587.

But this question becomes immaterial because the trial court held that the section in question, even if void, could perhaps be eliminated and still leave the remainder of the act unaffected thereby.

The suggestion which the distinguished judge made that the act was intended to operate upon interstate commerce is equally unfounded. I have heretofore adverted to the rule which this court recognizes, that the decision of the Supreme Court of a State as to the construction put upon a State statute is always conclusive on this court. Or as this court has expressed it in a Minnesota case:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive and not to be re-examined here as to its propriety or accuracy." Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 456.

The question as to whether the act applies to interstate commerce has been called to the attention of the Texas Supreme Court more than once. In the case of the Texas Brewing Co. v. Templeman, 38 S. W. Rep., p. 28, the court in discussing the contract made on the basis of that suit, said:

"There is no question of interstate commerce involved in this case, and it is therefore apparent that the contract cannot be the foundation of a proper judgment."

In the case of Fuqua v. Pabst Brewing Company, 38 S. W. Rep., page 30, the court in discussing another contract, by the

terms of which beer was shipped from Milwaukee, Wis., to Amarillo, Texas, said:

"The parties contracted for the sale and purchase of beer to be transported from Milwaukee, Wis., to Amarillo, Texas, to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce and not subject to State regulation without the consent of Congress, nor did the statute (meaning the statute in question) *undertake in any way to regulate or prohibit same.* But the parties by the same contract voluntarily went further and so dealt with the subject after it had ceased to be an article of interstate commerce as to create a trust as above shown, in violation of the statute."

This opinion of the Supreme Court of Texas settles the question that the statute under discussion was not intended by the legislature to affect interstate commerce in any sense whatever. That construction being accepted by this court eliminates that question from the case, and the appellee is left to rest his case on the single proposition that the exemption of farm products in the hands of the producer and live stock in the hands of the raiser from the operation of the statute makes it invalid.

Recapitulation: Appellant insists on the following propositions:

1. That the writ of *habeas corpus* should not have been granted by the Circuit Court of the United States for the Northern District of Texas, and that in granting the same the court abused the discretion with which it was clothed.

2. That in no event ought the writ of *habeas corpus* to have been granted before a trial was had in the State court and judgment therein rendered.

3. That the appellant should have been remanded to the custody of the State court without reference to the validity of the statute upon which the charge was based.

4. That the statute is valid, and that none of the objections urged thereto can be maintained.

Appellant is anxious to secure the decision of this court upon the validity of the statute, for the reason that the State has so many cases pending depending upon this result, yet he respectfully submits that if appellant's contention as to the circumstances under which a writ of *habeas corpus* should be granted is correct,

that rule ought to be stated so clearly as to prevent any further conflict between the State and the Federal courts upon questions of this character.

Respectfully submitted,

M. M. CRANE,

Att'y for John W. Baker, sheriff, etc., appellant.

No. 336

Reply Brief of Crane

Filed Jan. 8, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 336

JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

v.

WILLIAM GRIGG, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

REPLY BRIEF OF APPELLANT.

M. M. CRANE, Att'y Gen'l,
Attorney for John W. Baker, Sheriff, Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

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JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

REPLY BRIEF OF APPELLANT.

Since the appellant's brief was filed in this case, counsel for appellee have filed a printed brief of fifty-one pages, and in addition thereto an argument of fifty-eight pages. To these appellant desires now to reply.

In their brief they insist that but two questions are involved in the case. They are as follows:

First, Did the Circuit Court of the United States for the Northern District of Texas err in assuming jurisdiction by way of habeas corpus in advance of a trial by the State courts?

Second, Is the act of March 30th, 1889, upon which the indictment was based, violative of the Constitution of the United States?

They premise their discussion of these two questions by the statement that it is the duty of the Federal Courts to guard, protect and preserve the Constitution of the United States. That is conceded. But, it is not their exclusive duty. This court has said:

"Upon the State Court *equally* with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the *judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the Supreme law of the land*, 'anything in the constitution or laws of any State to the contrary notwithstanding.'" Robb vs. Connelly, 111 U. S., 637.

The language is again repeated and approved by this court in in Ex Parte Royall, 117 U. S., 248. It appears, therefore, that the suggestion of appellee's counsel to the effect that the duty of guarding the Constitution devolves *exclusively* upon the Federal judiciary is not in accord with the decisions of this court. Bearing in mind that the duty of guarding the Constitution of the Federal Union is as binding on the State courts as it is on the Federal judiciary, no reason can be assigned why the appellee in this case should have been taken from the State court before trial and compelled to submit to the jurisdiction of the Federal Circuit Court.

Counsel for appellee, on pages ten and eleven of the brief, in undertaking to give a reason why the writ of habeas corpus was asked for by appellee, makes the following statement:

"*No complaint is made by appellee*, who was the relator below, as to *any action of the State courts in the progress of this prosecution, except that the highest court of the State of Texas having criminal jurisdiction, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants as citizens of the United States under the Constitution thereof, and that he was unable to get a trial.* The record here abundantly demonstrates, and that without contradiction on the part of appellant that an honest attempt was made to have the rights of this appellee and his co-defendants as citizens of the United States under the Constitution thereof, determined and adjudicated by the highest court of the State of Texas having criminal jurisdiction, in which they were unsuccessful."

This statement of appellee's counsel simplifies the issue. It is an admission. They state substantially that they base their right to seek relief by *habeas corpus* in the Circuit Court of the United States upon two propositions only:

First, That the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants, as citizens of the United States, under the Constitution thereof.

Second, that he was unable to get a trial in the trial courts of the State.

The first question that arises is:

Did the Texas Court of Criminal Appeals refuse or fail to pass upon or adjudicate the rights of the appellee, secured to him by the Constitution of the United States?

If the court did not so fail or refuse, this part of his application must be held insufficient. The record discloses that appellee was never tried, never convicted, never appealed, and hence never reached the Court of Criminal Appeals. That high tribunal acquired no jurisdiction over his person. It was therefore powerless to enter any decree, order or decision affecting his rights. How appellee can charge that that tribunal refused to determine his rights under the Federal Constitution when he was never before that court asking for such decision, is difficult to understand. There is not even a pretext for the contention made in the first proposition by appellee's counsel that the Court of Criminal Appeals refused or failed to adjudicate his rights under the Federal Constitution unless that contention be based upon the idea that Hathaway's trial, conviction and appeal can be considered as the trial, conviction and appeal of appellee. They have effectually waived that, however, in the admission made on page 11 of their brief, in which they say: "Counsel for appellant have endeavored to obscure the issue as to jurisdiction by a lengthy argument relating to the point that appellee has never had a trial; that his case is entirely distinct from that of Hathaway; that he has never made any attempt to present to the court his defense as to the unconstitutionality of the Act of March 30th, 1889, and a great deal more upon that line. Counsel for appellant should not mistake the issue, nor

endeavor to mislead the court as to the issue. *Hathaway has been eliminated from this case.*" (Appellee's brief, bottom of page 11).

The suggestion that counsel for appellant is endeavoring to mislead the court, may be passed as unworthy of notice. But I now ask the counsel for the appellee, when did the Texas Court of Criminal Appeals fail to adjudicate the rights of appellee secured to him by the Constitution of the United States? Was he ever before that court? Is not the contention based upon the idea that Hathaway's appeal and Hathaway's case was the appeal of appellee in appellee's case? If Hathaway be eliminated from this case, how can they fairly say that the Court of Criminal Appeals refused to perform its duty to appellee. It seems most illogical for counsel to say that Hathaway has been eliminated from this case, and then devote pages of their brief and argument to demonstrate the errors made in his trial. The greater part of their writ for habeas corpus is taken up with the description of Hathaway's indictment, trial, conviction, subsequent incarceration, his appeal to the Court of Criminal Appeals, and its delay in passing on his case, together with the alleged argument of State's counsel in that case; the fact that he applied for a writ of habeas corpus is noted, and that afterwards the case against him was dismissed in the State court by the then County Attorney. Counsel for appellee even go so far as to question the motives of the County Attorney in dismissing that case, and charge that it was done because he was afraid to meet them in the Federal Court to test the constitutionality of the statute. They fail to state, however, why counsel for the State was not afraid to meet them in the Federal Court in this case, and why appellee's case was not likewise dismissed. I have heretofore shown in the original brief that the then County Attorney of McLennan County had express statutory authority for the course that he pursued, in reference to the dismissal of Hathaway's case. The ordinary presumption is that an officer has done his duty as he understands it. There is nothing in the record to indicate that Hathaway after the reversal of his case ever asked for a trial in the State court. Perhaps this writ of habeas corpus was the first time that it was called to the attention of the County Attorney.

But what has his motive to do with the question? If as appellee's counsel say Hathaway has been eliminated from this case, why are any of these questions being discussed by them, or why should the proceedings of Hathaway's case be called to the attention of this court in this? It seems that counsel for appellee are at a loss for some substantial reason for their application to the Federal court for a writ of habeas corpus; when they complain at the action of the court of last resort in Texas they must base their allegations upon the rules, decisions and orders had in Hathaway's case, because appellee's case, as before shown, never reached that court. Then when the difficulty of making a vicarious atonement of Hathaway is called to their attention, and when the absurdity of their contention is made manifest they exclaim most vehemently that *Hathaway is diminated from this case.* With Hathaway must go all complaints as to the action of the court in his case.

But suppose, for argument's sake, that it be conceded that the trial of Hathaway was the trial of appellee; in other words, suppose the appellee was tried in the District Court of McLennan County, convicted, and appealed to the Court of Criminal Appeals, and that the Court of Criminal Appeals had then decided in his case that the facts did not justify his conviction, or that the indictment in that case was not sufficient, but failed to pass upon the constitutionality of the statute upon which the indictment was based. Would the failure to pass upon the constitutionality of the statute entitle appellee to apply to the Circuit Court of the United States for a writ of habeas corpus before submitting the case again to the trial court under the instruction of the Court of Criminal Appeals? In other words, does the failure of the Court of Criminal Appeals, the court of last resort, to decide more than enough to dispose of the case, entitle him to a writ of habeas corpus in the Federal court?

The question, I know, is absurd, but it is suggested by the grave and learned argument of counsel for the appellee in this case. If it would not authorize the writ of habeas corpus to be issued, then certainly on that branch of the case counsel for appellee have no standing, and the writ of habeas corpus was improvidently and illegally issued in the court below, unless it can be justified upon the second ground above mentioned. As be-

fore indicated, had the appellee in this case been tried and appealed to the Court of Criminal Appeals and the constitutional question been fairly presented, it would not have been proper for that high court to have decided the constitutional question, unless it became necessary to the disposition of the case. On that point an eminent text writer uses the following language:

"Where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Cooley's Constitutional Limitations, Sixth Edition, 196, and authorities there cited.

There was "another and clear ground" upon which the Court of Appeals rested its decision, viz., that the evidence was insufficient. So that instead of the Court of Criminal Appeals subjecting itself to the severe criticism which counsel for the appellee have made, it was entitled to commendation, because it was but following the beaten path laid down by the courts of last resort and by the most eminent text writer on constitutional questions that has lived during the past century.

Reduced to its last analysis, appellee's position is that the recognition of the well-established rules of judicial propriety by the Texas Court of Criminal Appeals gives him the right to apply for a writ of habeas corpus in the Federal courts. Is it not absurd?

Counsel for appellee insist that I did not correctly state in the original brief the ground on which the Court of Criminal Appeals based its decision in the Hathaway case.

I stated, in substance, that the court reversed the case because the evidence was insufficient to support the conviction. Counsel for appellee say that it was because the indictment was insufficient.

This court will be able to judge whether I correctly stated the ground or not.

The Court of Criminal Appeals, in discussing the matter, used the following language:

"It will be seen that the State, by its testimony, failed to reach defendant with any evidence even tending to show that he was an original conspirator, or that he entered into a conspiracy in restraint of trade, which, of course, would apprehend that he had full knowledge of the object and purpose of such conspiracy, and its plan of operations. And when we come to consider his testimony, his evidence shows that his only connection with the alleged trust, was as agent and employee of the Waters-Pierce Oil Company, at a stipulated salary of $2,700 a year. * * * Certainly there is no testimony of any connection on his part, or that he had anything to do with the oil trade in McLennan County. McLennan County was in another and distinct division, and not under his management or control. Not only does the State fail to furnish any affirmative proof bringing him in contact with the transactions of Grice and Hawkins in McLennan County, but by his own testimony he negatives the proposition that he had anything whatever to do with the oil trade or with cutting rates on oil in McLennan County. * * * Of course, if there was any testimony in this case showing that he was one of the original conspirators, or that he entered into a conspiracy after it had been formed, he might be affected by the acts of the agents of the said trust in McLennan County. But, as we have seen, there is no such testimony. If he had been indicted as an agent for some act done in McLennan County, the proof would not have sustained the accusation, because there is no testimony that he acted as such agent or in conjunction with any agent of the trust in McLennan County, nor is there any evidence tending to show that he advised, aided, or encouraged any man in Texas, or anywhere else, to enter into the conspiracy, or to act as agent therefor."

It is manifest that the construction which I placed upon the decision of the Court of Criminal Appeals is the only one of which it is susceptible. It is true that the court said that if appellant had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment, for the reason that if he be held responsible as an agent the indictment must allege that he knew of the conspiracy and its purposes. (Record, p. 63.) But previous to that the court had said:

"If he had been indicted as an agent for some act done in McLennan County, the proof would not have sustained the accusation, because there *is no testimony* that he acted as such agent or in connection with any agent of the trust in McLennan County, nor is *there any evidence tending* to show that he advised, aided or encouraged any man in

Texas, or anywhere else, to enter into this conspiracy, or to act as agent therefor." (Record, p. 63.)

It seems to me too clear for argument that the Court of Criminal Appeals reversed the Hathaway case because the evidence was insufficient to connect him in any way with the original conspiracy, or with any illegal transaction connected therewith, as agent or otherwise. The court held that he could not be convicted, for want of testimony. But this controversy between the counsel for appellee and appellant is wholly immaterial. The point was not raised in the lower court. *The appellee did not base his petition for habeas corpus upon the ground that the indictment by which he was charged was insufficient*, but upon the fact that *the Court of Criminal Appeals had failed to determine the validity of the statute upon which he was indicted;* and, second, that the trial court had *denied him a trial*. The insufficiency of the indictment to charge appellee as agent, is immaterial. It does not charge appellee with being an agent, and as to whether he is guilty of being an original conspirator or aiding the original conspiracy so as to make him a principal offender, is a matter into which this court will not inquire. Not being charged as an agent, he cannot be tried as an agent; that much is certain. But as to whether the evidence is sufficient to convict him under the present indictment, is a matter of no consequence. It is proper to say, however, that the statement of appellee's counsel, to the effect that the cases of Hathaway and the appellee rest substantially upon the same facts, is not agreed to. On the contrary, while the record is silent on the entire subject, the contention of the State's counsel is that the facts in the two cases are essentially different.

An inspection of the application for writ of habeas corpus will demonstrate that it is based on the idea only that the Court of Criminal Appeals failed to determine the validity of the State statute and because the trial court refused him a trial—but not because the indictment was insufficient to charge him as agent. But suppose it were otherwise? How can this court in this case determine that the State of Texas will not be able to prove all of the allegations in the indictment against the appellee? There is no allegation in the petition for writ of habeas corpus that the evidence is insufficient to convict him, and even if there

were such an allegation, I apprehend that this court would require that issue to be tried in some other tribunal. Certainly this court will not make a writ of habeas corpus perform the office of an appeal or writ of error, and by it undertake to do more than determine the legal questions involved, leaving the issues of facts to another tribunal.

It seems to me that the appellee is in no position to complain of the action of the Court of Criminal Appeals in Hathaway's case, no matter from what standpoint this controversy may be viewed. In so far, therefore, as his application for writ of habeas corpus is based upon the failure of the Court of Criminal Appeals to decide the validity of the statute, it must fail, because a sound public policy demands that no one shall dictate to a court of competent jurisdiction what it shall decide in a given case, provided it decide every point necessary to the determination of the particular controversy.

This leads, therefore, to the consideration of the second proposition upon which the application for a writ of habeas corpus was based, i. e., that the State trial court denied appellee a trial.

"*Did the District Court of McLennan County deny the appellee a trial?*"

To say that the appellee was denied a trial presupposes that he asked for one. I submit that there is nothing in the record to indicate that the appellee ever, at any time, went into the District Court of McLennan County, Texas, and asked to have his case tried or even asked to have it set down for trial. The allegation in reference to that point and the only one giving this court any information thereon, is contained in appellee's petition for writ of habeas corpus, which reads as follows:

"Your petitioner further shows that since the rendition of said judgment by said Court of Criminal Appeals (meaning judgment in the Hathaway case) two terms of said District Court of the 54th Judicial District have been held, one of which is *now nearing its close;* and while this petitioner, together with his codefendants who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants not only to the shame and

contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner as well as his codefendants are without a remedy in the State courts of Texas for the assertion and vindication of their rights under the Constitution of the United States." (Record, p. 5.)

There is no statement in the paragraph quoted to indicate that appellee ever *asked to have his case tried* or ever *asked to have it set down for trial.* It will also be noted that the appellee makes no complaint as to any delay in the trial in the District Court until *after the reversal of Hathaway's case.* It appears from the paragraph of his application above quoted that the appellee charges that there were two terms of the District Court held since the reversal of Hathaway's case, and one of them was still in session though "nearing its close" at the date when the writ of habeas corpus was sued out. (Record, p. 5.)

2nd. That appellee and his codefendants stood "ready and anxious" for trial, but appellee fails to allege that he asked for a trial or that he communicated the fact of his "anxiety" therefor to any person. From appellee's application it must therefore be clear, that (*a*) he complains of nothing done by the trial court before the reversal of Hathaway's case. (*b*) That but two terms of the trial court had been since held, and one of them was then in session.

It will be noted that there is no allegation in the paragraph quoted to the effect that the appellee ever asked to have his case tried, or ever asked to have it set down for trial. If the facts had justified the allegation, the presumption must be indulged that it would have been made. He also makes clear the point that but two terms of the District Court have been held since the reversal of Hathaway's case, and that one of them was still in session at the date that the application for writ of habeas corpus was made. In the language of the application, "it was nearing its close." The case then stands this way: Appellee complains because the Court of Criminal Appeals did not decide the constitutional question in Hathaway's case. As presented, I submit it would have been improper for it to have decided it. Certainly its decision was unnecessary.

The other jurisdictional ground is that his case was not called

for trial at either of the two terms of court held after Hathaway's case was reversed; although, as repeatedly shown herein, he fails to allege that he ever asked for a trial, or ever asked to have the case set for trial, although one of the two terms of court was still in session when his petition for habeas corpus was presented. It is upon these grounds that he seeks the jurisdiction of the Federal court.

When one seeks the extraordinary remedy of habeas corpus at the hands of the Federal court for the purpose of being taken away from the State court before a trial and judgment, he ought to state to the court, in clear and unambiguous language, facts which clearly authorize the Federal court to interfere, and which make his a "peculiar and urgent case." The postponement of a case for one entire term and a portion of another is not such an abuse of discretion as would justify the application. It certainly does not make the case a "peculiar and urgent" one, such as this court has said must exist before the Circuit Court should act. In this connection permit me to repeat that the appellee has not stated the case in clear and unambiguous language. He has not stated under oath, in his application for a writ of habeas corpus, that the trial court denied him a hearing, but he has contented himself with stating that he "stood ready and anxious" for a trial, and that the court had not tried him nor called his case for trial. From this expression that he stood "ready and anxious" for a trial he desires this court to *infer* that he asked for a trial, but that he could not obtain it. Can it be said that because a man has stood ready and anxious for a trial that he must of necessity have sought one? Does the implied readiness and anxiety necessarily mean that he has tried to accomplish the purpose for which he stood ready and anxious? Surely not. But if the language is susceptible of that construction, then it is controverted by the return of the sheriff. That officer, on his return to the writ of habeas corpus, uses the following language: "I would respectfully show to the court that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties toward relator and his codefendants. That said authorities have *'been anxious and ready'* to accord to all the defendants under the indictment heretofore mentioned that speedy

trial which they were accorded under the constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own seeking, and by virtue of their own acts. That the call docket of the District Court of the Fifty-fourth Judicial District of the State of Texas, where such indictment is pending, shows that at the first term of said court, after such indictment was presented, said case was set down for trial on March 14th; that upon the call of said docket for trial it was continued by agreement between the State and defendants; that at the succeeding September term, the case was set down for trial on October 4th, but on call of the same for trial, it was continued upon the motion of defendants; that it was again set down for the November term, to be tried December 2nd, 1895; that when the case was called relator claimed a severance, to which they were entitled under the laws of the State of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein." (Record, p. 69.)

It will be noted from the above that the sheriff says in his return that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties toward this relator, and that said authorities have been "*anxious and ready*" to accord to all the defendants under the indictment heretofore mentioned that speedy trial which they were accorded under the constitution and laws of the State of Texas. If appellee insists in this court that the allegation in his petition for habeas corpus, to the effect that he stood ready and anxious for a trial in the State court, is sufficient for this court to infer that he meant to be understood as saying that he had sought and failed to get a trial; then I would submit that the answer of the sheriff to the effect that the State authorities have been "anxious and ready" to accord to all the defendants under the indictment that speedy trial to which they were entitled under the constitution and laws of the State, is a sufficient answer thereto and complete denial thereof. The appellee insists that he was "ready and anxious" for a trial, and therefore asks this court to infer that a trial was denied him. If that construction be placed upon his language, then I insist that the language of the sheriff to the effect that the State authorities

have at all times been "anxious and ready" to accord him that speedy trial to which he was entitled under the constitution and laws of the State, should be interpreted to mean that they had offered him a trial and he had refused it, and therefore controverts his allegation in his petition.

In other words, I insist that when the return of the sheriff uses precisely the same allegations in reference to the State authorities that appellee uses in reference to himself, that they ought to have a similar effect and interpretation. Give the appellant the benefit of that construction which appellee seeks to have put upon his own language, and the return of the sheriff cannot be regarded as other than a complete denial of the allegations made by the appellee and all the inferences to be deducted therefrom. The action of the Circuit Court of the United States, in granting the writ of habeas corpus, was not justified by any allegation in the petition of appellee. The return of the sheriff, however, should have prevented the discharge of the prisoner, even had the petition been sufficient.

The Court of Criminal Appeals was not derelict in its duty in refusing to decide the constitutionality of the statutes in the Hathaway case. It decided enough to dispose of the controversy between him and the State. But whether it did or not, appellee had no cause to complain.

Appellee's petition for habeas corpus, as before indicated, was insufficient to show that the District Court of McLennan County failed and refused to grant him a trial. Controverted as it was by the return of the sheriff, the prisoner should have been remanded to the State court. The return of the sheriff imports absolute verity on its face.

Crowley vs. Christensen, 137 U. S., 86, 94.

To hold appellee's petition sufficient would be in effect saying that whenever the statute of the State is suspected of being in conflict with the Federal Constitution and the court of last resort in the State fails to determine that question in the first criminal case arising thereunder, that any other person indicted for the violation of that statute, if he can show that his case was not tried at the second term of court, although he does not deny that one of the postponements was on his own motion, and does not

allege that the court refused to try him, may seek relief in the Circuit Court of the United States. Such a precedent would have nothing in it to commend it to thoughtful people. It would encourage conflicts in the jurisdiction between the State and Federal courts, and would be a source of embarrassment to those courts that otherwise would never exist. It would still more greatly embarrass the State courts in the administration of the laws made by the legislature.

In answer to the suggestion of counsel for appellant to the effect that appellee went into voluntary confinement in order that he might sue out his writ of habeas corpus, counsel for the appellee grows serious and insists that the appellee was in custody while he was out on bond. It is conceded that the statement is made in many of the authorities that a prisoner is in the custody of his sureties, but I understand that to be a fiction of law. The courts do not mean to decide more than to hold that the sureties have the right to control the movements of the accused. They do not mean to hold that he is in actual custody, and if counsel for the appellee believe to the contrary, if they believe that a man out on bond is in actual custody and actual restraint, as they argue, why did they surrender their client into the hands of the sheriff before suing out the writ of habeas corpus? Why did they not go to the Circuit Court of the United States and say that he was unlawfully restrained of his liberty by his sureties? It is too absurd for argument, and counsel for appellee can not help their contentions in this case by undertaking to put me in a position of controverting the statements of all of the law writers to the effect that the sureties have the right to control the movements of the accused, and in that sense the accused is their prisoner. My statement that the accused is not in actual custody when he is out on bail, is sufficiently corroborated by the action of the learned counsel for the appellee, who procured their client in this case to be surrendered to the sheriff before they sought the interposition of the court to give him his liberty.

But counsel for the appellee say that it is no part of the business of appellee to know by what reason or what motive the appellant was surrendered into the custody of the law. There might be some force in that contention if made in a proper case; but in cases like this, where the imprisonment of their client is made the basis

of their complaint, it is proper to show that the imprisonment was voluntary. This is particularly true here, because the record indicates that they have willingly submitted to the delays of which they now complain, and have sought the custody of an officer for the sole purpose of changing the venue of their cases from the State to the Federal court.

Counsel for appellee are not justified, as I have heretofore stated, in the assumption that the State did not want to try the appellees. It might, with better show of reason, be stated that the appellees did not want a trial in the State court. Why? Because their petition for writ of habeas corpus though drawn out to a great length, failed to allege that they went into the State court and asked for a trial, or to have a day for trial fixed. Had it been true, it would have been alleged.

I would respectfully submit, therefore, that there is nothing in this record to justify the issuance of the writ of habeas corpus by the Circuit Court of the United States for the Northern District of Texas.

It is hardly necessary for me in this connection, to disclaim the position so generously (?) assigned me by counsel for appellee. They found by "reading between the lines," that I think a State court can do no wrong, and that a Federal trial court can not do right. Wonderful discovery that! How great must be their power to be able to read that which was never written—to hear that which was never uttered nor conceived in my mind. There is nothing in my brief to justify the suggestion. There is nothing in any utterance or act of mine that will excuse it—unless it be that I have prosecuted this appeal. That is the "head and front" of my offending.

If I am right in the foregoing, it must follow that the Circuit Court of the United States for the Northern District of Texas had no jurisdiction to issue the writ of habeas corpus. But, if the court goes farther than this preliminary question and looks into the validity of the statute, then I submit the counter-proposition that:

The statute is valid, and that it does not arbitrarily discriminate between different citizens and classes of citizen of the State of Texas and the United States, and that it does not deny to cer-

tain citizens and classes of citizens the equal protection of the laws.

In support of the proposition that the law is invalid, counsel for the appellee have cited numerous cases, some of which were examined by me in the original brief. It is not my purpose to repeat anything therein stated. For that reason, the first case cited by counsel for appellee will not be further noticed here. The case of Duncan vs. Missouri, 152 U. S., 382, is relied on. In that case it was contended by Duncan that the Constitution of Missouri secured to him the right to have his case adjudicated on appeal by a supreme court of five judges, that being the number provided by the State Constitution at the date of the commission of the offense with which he stood charged. Subsequent to the commission of this offense, the Constitution had been amended so as to authorize his case to be decided by three members of the court. He insisted that the amendment was obnoxious for the reason that it denied him due process of the law and the equal protection of the law and abridged his privileges and immunities in contravention of the 14th amendment. The court in that case answered him by saying that due process of law and equal protection of the laws were not denied him, because the law operated upon all alike and did not subject him to any arbitrary exercise of the powers of the government.

The case of Harding vs. People, 160 Ill., 459, and Millett vs. People, 117 Ill., 294, upon which they rely, hold in substance and effect that "due process of law" and "law of the land" are synonymous and refer to general public law, operating upon all alike, and not to such as singles out and designates without reason particular persons and classes. As to that general proposition, there can be little doubt. The definition therein given is practically the same as that recognized by the law-writers everywhere. If the statute involved in the case at bar discriminates *without reason*, then those decisions are applicable. In the cases of Frorer vs. People 16 L. R. A., 492; Ex Parte Jentich, 32 L. R. A.; and the State of West Virginia vs. Goodwell 6 L. R. A., 621, the same general proposition is maintained. In In re Garribad, 19 L. R. A., 858, upon which appellee relies, the doctrine is announced that an ordinance which prohibited street parades with shouting, singing or music, without

obtaining permission from a city officer, but excepting from its provisions funerals, fire companies and political parties having a State organization, is unjust because of unreasonable discriminations; but in that case the fact was recognized that just discriminations could be made. There is nothing in that case which in any sense militates against appellant's position in this.

In the case of the State vs. Loomis, 115 Mo., it was held by a divided court that a statute prohibiting miners from issuing certain classes of paper to their employees and paying them in goods rather than in money was null and void because it was an unreasonable discrimination against miners. In a very learned dissenting opinion by Mr. Justice Barkley, the opposite view was very strongly presented. To this opinion and the authorities there cited, attention is respectfully asked. State vs. Loomis, 115 Mo., 320-326.

I have been unable to find the case of State vs. Inro, 120 Mo., which appellee's counsel cite, for the reason that it is not in the book cited by them. In the case of the State vs. Walsh, 37 S. W. Rep., 112, the Supreme Court of Missouri decided that a statute which prohibited pools being sold except on the premises of the seller or inside of the race-course, was unconstitutional in that it conferred a special privilege that was denied everybody else,—*for which discrimination no reason could be given.*

Another case cited by appellee is that of the People vs. Marks, 99 N. Y. It was there held that a legislative enactment which absolutely prohibited an important branch of industry, not injurious to the community and not fraudulently conducted, solely for the reason that it competes with another, is unconstitutional. It is manifest that the cases above cited have no application to the question in hand. In the case of Wallace Heirs, 2 Yerger, 555, the Supreme Court of Tennessee held that the law of 1827, authorizing the court to dismiss all cases prosecuted for the use of another, was a partial law and therefore obnoxious to their State Constitution. In the other Tennessee case, Van Zandt vs. Waddell, 2 Yerger, 270-71, it was held that a partial law, tending directly or indirectly to deprive persons of vested rights or the equal benefits of the laws of the land, was unconstitutional and void.

In the case of Dent vs. W. Va., 129 U. S., 114, cited by appellee, it was held that there was nothing of an arbitrary character in the statute in question, as it was made to apply to all physicians except those who might be called from another State. The court held that it imposed no conditions that could not be readily met; and it was made enforceable in the usual mode in kindred matters, i. e., by the regular proceedings adapted to the case. Instead of supporting appellee's contention, it seems to me to aid appellant, because I believe it will be found that there is nothing of an arbitrary character in the statute under review in this case. It was made to apply to all persons except those who were dealing in the products of their own labor. It imposed no conditions which cannot be readily met, and it is made enforceable in the usual mode in kindred matters, i. e., by regular proceedings adapted to the case.

The case of County of San Mateo vs. Southern Pacific R. R. Co., does not support the proposition stated by appellee. That decision follows the others in this court upon the subject of taxation, and recognizes that different rules may be applied to different kinds of property, and different methods of taxation may be resorted to. The dissimilar conditions of property render that absolutely fair and just. This is illustrated by cases cited in our former brief: State Railway Tax Case, 97 U. S., 912; Kentucky Tax Cases, 115 U. S., 578, and others there cited.

The cases which counsel for appellee rely upon may be classified as follows:

1. Those which hold that the regulation of the business of miners, compelling them to weigh coal in a certain manner, or to pay wages in money and not in merchandise, is void. Such as the Illinois, West Virginia and Missouri cases.

2. Those which provided different rules for the collection of debts from a certain class of debtors, and which the courts have held have no reason to support the discrimination. Such is the case of G., C. & S. F. vs. Ellis, 165, U. S.

3. Those that hold that no law can be passed giving to certain individuals an arbitrary right not given to others similarly situated. Such are the Tennessee cases.

It is unnecessary to say that the statute under discussion does not fall within any of the classes named. It prescribes no rules

for the collection of debts. It does not purport to give any arbitrary right or remedy to any one not granted to others similarly situated. The Missouri, West Virginia and Illinois cases, which deny to the legislature the right to regulate the mining business, are not universally admitted to have been correctly decided. Other cases, equally as well reasoned and by courts quite as eminent, announce a different rule. The proposition that the legislatures may regulate the mining business in the several States, and protect the mining employees from the avarice and rapacity of the employer, is believed to be supported by the following authorities:

Charleston vs. Rogers, 2nd McCord, 496.
Stokes and Gilbert vs. New York, 14 Wendell, 87.
Schaffer vs. Union Mining Co., 55 Maryland, 74.
Hancock vs. Yadin, 121 Ind., 366.
Jones vs. People, 110 Ill., 590.
Archer vs. Jones, 2 Best & S., 89.

To these may be added a political authority: Adam Smith's "Wealth of Nations," Chap. 10.

But the result of this case need not depend upon the soundness or unsoundness of the rule announced in the cases cited by appellee. Those support the proposition that discriminations made by statutes which are purely arbitrary cannot be upheld. Those cited by appellant hold that where sufficient reason exists for the classification made the statute is valid. This much is implied in those cited by appellee. After all, the principal difference between the various courts does not seem to be in the announcement of the rule, but in its *application* to particular facts of each case. If the discrimination in this case is held to be arbitrary, supported by no sufficient reason which would call for the exercise of the legislative discretion, then, under all the cases, it would be held to be invalid. But, if a reason existed for the discrimination made, sufficient to call for the exercise of legislative discretion, then the statute must be upheld, whether this court believes it a wise or unwise discrimination. The power to discriminate in statutes is everywhere recognized. The great bulk of our legislation sufficiently attests that. As to what con-

ditions will justify discriminations, is the only debatable point. Of that, more will be said later.

Counsel for appellee seems to be very much at sea as to specific objections made to the statute in question. For instance, one of the first objections urged by them is, that it is applicable only to a small percentage of the population of Texas; that it is therefore void. This court, as well as all others, however, has held that it is immaterial *how many* or *how few persons* are affected by a statute, provided it applies to all persons and property similarly situated. Hays vs. Mo., 120 U. S., 111–112; Powell vs. Commonwealth, 114 Pa. Stat., 265; Powell vs. Pa., 127 U. S., 678; State vs. Addington, 77 Mo., 110; Butler vs. Chambers, 36 Minn., 69; Railroad vs. Beckwith, 12 U. S., 196; Walston vs. Nevin, 128 U. S., 578; In Re Obe, 21 Ore., 406; Youngblood vs. Trust & Savings Co., 12 Southern Rep., 579; Waterworks vs. Schotler, 110 U. S.; Wurtz vs. Hogeland, 114 U. S., 606; Railroad Co. v. Richmond, 96 U. S., 521–529; Jones vs. State, 78 Ind., 332; McAunich vs. Mississippi Railroad, 20 Ia., 338.

Appellee next insists that the statute is an attempted regulation or interference with interstate commerce, and is therefore void. It is well settled that the construction put upon a State statute by its own Supreme Court is conclusive as to the question of the legislative intent. Railroad vs. Minn., 134 U. S., 456; Machine Co. v. Gage, 100 U. S., 677; Pullman Palace Car Co. vs. Penna., 141 U. S., 21.

The Supreme Court of Texas has decided that it was not the purpose of the legislature in passing the statute in question to regulate interstate commerce,—in discussing the shipment of beer from outside of the State of Texas and an agreement to sell same in Texas, which was adjudged void because it violated the statute. The court said: "The parties contracted for the sale and purchase of beer, to be transported from Milwaukee to Amarillo, to be there delivered to Kingsbury and to become his property. So far the transaction was *interstate commerce* and not subject to State regulation, without the consent of congress; *nor did the statute undertake in any way to regulate or prohibit same.* But the parties, by the same contract, voluntarily went further, and so dealt with the subject after it had ceased to be

an article of interstate commerce as to create a trust, as above shown, in violation of the statute." Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., p. 30. This decision of the State Supreme Court settles that point.

That Texas has no authority to regulate interstate commerce is conceded. It is insisted that because it is made the duty of the Attorney-General to prevent corporations from doing business *within* the State if they violate this statute, that therefore its intention was to prohibit these corporations from doing an interstate traffic, and that it is therefore, at least to that extent, void. The language of the statute does not justify that construction. The decision of the court above cited is authority for the proposition that it was not the intention of the legislature in passing this statute to regulate or prohibit interstate commerce. It must, therefore, be concluded that the intention of the legislature was to compel the Attorney-General of the State to prevent corporations from *entering* the State and doing business as such *within* her territorial limits if they violated this statute. The doctrine that the State has the right to prescribe the terms upon which foreign corporations can come into its limits and do business within the State is not new. One of the terms and conditions which Texas has fixed for their admission and continuation is that they do not violate the anti-trust law. Pemb. Manufacturing Co. vs. Penn., 125 U. S., 123. See also authorities cited under this proposition on page 52 of the original brief.

It will thus be seen that the contention of appellee's counsel to the effect that the statute attempts to interfere with interstate commerce must fail.

Appellee insists that it denies to him due process of law. I cannot appreciate that contention in this case. If the statute is void at all, it must be because it denies appellee equality under the law. This brings us to consider whether the statute is void simply because it exempts from its operation agricultural products in the hands of the producer, and live stock in the hands of those who raise them. As heretofore indicated, nearly all legislation is in a sense special. It does not embrace all classes of property, nor all classes of persons. It is true that there are many acts that apply to every person within the limits of the

territory for which they are passed, but the great bulk of legislation applies to people or property in certain conditions only. The rule laid down by this court, as above stated, is that these discriminations, or classifications, as they are sometimes termed, will be upheld by this court, unless shown to be arbitrary. If the exemption is arbitrary the statute is unconstitutional. It is an elementary proposition that a statute is presumed to be valid until the contrary is shown, and that beyond a reasonable doubt.

Railway Co. vs. Casey, 26 Pa. Stat., 287.
State vs. Loughlin, 75 Mo., 147.
State vs. Addington, 77 Mo., 110-8.

It must therefore follow that unless the discrimination in question has been shown to be arbitrary, this statute must be upheld. If there is one construction or one hypothesis which is reasonable that would uphold the statute, then that construction or that hypothesis should be adopted, even though the other be more natural and more probable.

U. S. vs. Central Pac. Ry. Co., 118 U. S., 235-40.
Broughton vs. Pensecola, 93 U. S., 266.
Bedrock vs. Henry, 166 U. S., 599.
Hobbs vs. McLean, 117 U. S., 567.
U. S. vs. Coombes, 12 Pet., 72.
Ogden vs. Saunders, 12 Wheat., 270.
Grenada Co. vs. Brown, 112 U. S. 261.
23 Amer. and Eng. Ency. of Law., Subdiv. 2, p. 349, and authorities there cited.

I insist that the appellee has not discharged the burden which devolved upon him of showing that the discrimination in this case is arbitrary. He has therefore failed to show that the statute is unconstitutional. He cannot be heard to say that by showing a discrimination, that he has shifted the burden of proof on the appellant to show that the discrimination is reasonable. The burden never shifts from him who attacks the constitutionality of a statute. It has never been held that a statute which discriminates in favor of or against a certain class is invalid. When a person shows that a statute discriminates, he has only proved

half of his case. He must follow it up by showing that the discrimination is arbitrary and unreasonable. But in this case appellee has contented himself with showing that there is a discrimination, and has left this court to presume that it is arbitrary.

This court will not indulge in any presumptions against the validity of this statute. As a text-writer has said: "The legislature and judiciary are co-ordinate departments of the government; * * * and it is only when the courts find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action." Cooley's Const. Lim., Sec. 192-3. To find that the legislature has not kept within its constitutional limits in this case, this court must find that the statute discriminates, and that it discrimnates *without reason*, and that must appear beyond a reasonable doubt.

A court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizens, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.

Cooley's Cons'. Lim., 6 Ed., p. 197.
Wellington, Petitioner, 16 Pick., 87-96.

If the rule were otherwise, the government would be such as arbitrary discretion of its judges might suggest, and would differ as often as courts differ. In the language of this court, "There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard. But it is equally undoubted that no court, except in the *clearest* cases, can properly impute the disregard of those principles to the legislature. * * * This court can know nothing of public policy except from the constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in geenral, be addressed to the legislature. Questions of policy determined there are concluded here." (License Tax Cases, 5Wall, 469).

All mere questions of expediency and all questions in respect to the just operation of the law within the limits prescribed by the Constitution were settled by the legislature.

Perry vs. Keene, 56 N. H., 530.
People vs. Fisher, 24 Wend., 215-20.
State vs. Staten, 6 Cold., 238.
Walker vs. Cincinnati, 21 O. St., 14.
State vs. Smith, 44 O. St., 348.

The cases last above quoted show that courts cannot set aside an act under the impression that they have discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is held that nothing but express constitutional limitations can control the action of the legislature.

Cooley's Const. Lim., 6 Ed., 204-5.
Cochran vs. Van Surlay, 20 Wend., 365, 381-3.

This express conflict must be susceptible of being pointed out.

People vs. New York Central R. R. Co., 34 Barb., 123.
Gentry vs. Griffith, 27 Tex., 461.

Has the conflict in this case been pointed out? The fact that the Texas legislature can pass no law in conflict with the fourteenth amendment to the Federal Constitution is admitted. But does this law conflict with the fourteenth amendment? The burden being upon the appellee to point out the conflict, I ask has it been discharged? If so, how has it been discharged? Have not counsel for appellee contented themselves with showing that the statute does not apply to all persons? In other words, that it discriminates, or exempts property from its operation under certain conditions. Is there anything new in that? Do not police regulations which are applicable alone to railroad companies exempt all other property from their operation? Do not the statutes and ordinances regulating the laundry business exempt all other kinds of business from their operation? Are not the regulations of the liquor traffic applicable alone to that class of business? Are not the statutes prohibiting the playing

of cards in public places, and exempting other games from their operation, in the same sense discriminative? It cannot therefore in fairness be said that this statute is void simply because it is not applicable to all classes of property and persons, without reference to the circumstances and conditions surrounding them. If it be void for that reason, then all the legislation above mentioned is likewise void. Counsel for appellee must go further than to say that there is a discrimination. They must show that it is an *unjust* or *unreasonable* discrimination; that it is arbitrary; that there was no reason to justify the legislative action.

In discussing this question, I submit that the same rule applies to this as to all other constitutional questions. If there is a doubt as to whether the discrimination is arbitrary, that doubt must be resolved in favor of the statute. In other words, if this court entertains a doubt as to whether the conditions justify this exemption, that doubt should be resolved in favor of the statute. It should not be forgotten that appellee's contention is that the legislature exceeded its authority when it engrafted the exemption complained of on the statute under discussion; in other words, that no sufficient reason existed for its exemption of agricultural products in the hands of the producers and live stock in the hands of the raisers from the operation of this statute. It is too clear for argument, as heretofore suggested, that upon appellee rests the burden of establishing the unreasonableness of the exemption. The statute was passed to affect conditions in Texas; it has no extra territorial operation. The reasonableness of the exemptions must be judged by the conditions in Texas existing at the date of the passage of the act, as well as since. And in this connection I deem it not improper to suggest that as to whether the conditions existed which justified this exemption, great weight should be given to the opinion of the Supreme Court of Texas. It is composed of lawyers, not only learned in the law, but cognizant of the conditions existing within their jurisdiction. Inasmuch as they have held the statute valid, it must be conclusively presumed that they, at least, believe the conditions in their State justified the exemption made. I do not mean to be understood to say that this court should abdicate its right to finally determine the question for

itself; this I know it ought not, and will not do, but I mean to say that in the first place, all of the presumptions favoring a statute passed by a legislature should be indulged by this court in favor of the one under discussion; and further than that, that inasmuch as the reasonableness of the exemptions rests upon the local conditions in Texas, the opinion of the Supreme Court of that State, that the conditions justify the exemptions, ought to receive the greatest consideration, and in the event of any doubt should be held sufficient to turn the scales in favor of the statute.

An examination of the statute under consideration will show that its purpose has been misunderstood by appellee. Its first section defines a trust as "A combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any or all of the following purposes: (1), to create or carry out restrictions in trade; (2), to limit or reduce the production or increase or reduce the price of merchandise or commodities; (3), to prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities; (4), to fix at any standard figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State; (5), to make, enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall in any manner agree to keep the price of such article, commodity, or transportation at a fixed or graduated figure," etc. It will be noted by the terms of the statute that all combinations of capital, skill or acts are not prohibited. But only those combinations entered into for one of the purposes therein named. It will also be apparent from an inspection of the act that the purpose was to prevent combinations which would result in destroying competition or fix the price which the consumers of Texas would have to pay for the necessaries of life. So evident is this purpose, that it rendered un-

lawful to increase the prices of commodities by fixing a standard freight rate by transportation companies, which would necessarily affect the price of the article used. The language of the statute clearly implies that its main purpose was to reach *manufacturers* and *dealers* in those commodities.

I have heretofore adverted in the original brief to the fact that the Supreme Court of the State have practically held such to be the purpose of this act. (Original brief, pp. 61–2; Ins. Co. vs. State, 86 Tex., 250.)

This court recognized the same condition in the case of the United States vs. Freight Association, 166 U. S., 319. In that case, speaking through Mr. Justice Peckham, it said that the "history of the times" shows that there was complaint at the rates charged by the railroad companies, as well as the combinations alluded to. The Texas statute covers the transportation question as well as others, and therefore was based on all of the complaints which the "history of the times" shows were made. This court judicially knows that there never was any complaint made that the farmers, as such, were controlling the prices of products which they raised. It is also true that there never was a complaint made in the United States to the effect that the stockraisers were controlling the price of beef. There never have been any complaints as to those two classes, and it would therefore have been a little singular for the legislature of Texas to undertake to prevent an evil, the existence of which was not recognized. This court takes judicial knowledge of everything that is generally known. It must be generally known to even the most casual observer of current events that the facts are as I have stated them here. There have been congressional investigations, legislative investigations and judicial inquiries to which the attention of the entire country has been directed, in which complaints have been made of combinations of capital and the destruction of competition. It was charged that they have successfully controlled the prices of all commodities necessary to existence. Indeed they controlled everything that has been eaten and worn. But in no instance has any complaint ever been made that the farmers of the United States had undertaken to control the prices of their products. If there had existed any cause for complaint, is it not reasonable to suppose that it

would have been made? If no ground of complaint existed, and therefore no complaint was ever made, why should the Texas legislature undertake to prevent something that has never happened, to prohibit a condition which had never heretofore existed, and which could not from the nature of things exist. To say that a statute is void because it does not prohibit results impossible to secure is absurd in the extreme. I repeat what I have heretofore said. Farmers cannot control the price of the products of their farms. It is well known that the financial condition of the farmers of the entire country is such as to render that sort of a combination impossible. It is true that many of them are in comfortable circumstances, but it is well known that particularly those who are tenants, and more of those of small holdings, are compelled to sell their farm products as soon as they can be prepared for the market. Therefore no combination can be made which will prevent their sale, because their necessities demand that they market their products immediately in order to pay the cost of production, and to prepare them to plant and raise the next year's crop. These facts are generally known. Therefore I take it that this court will take judicial knowledge of them, even though counsel for appellee do not deem them of sufficient importance to give them even a passing notice. I submit, therefore, that this exemption can be based upon two grounds:

First, That there had never been any complaint that the farmers and stock raisers had combined for the purpose of controlling the prices of products.

Second, That this court judicially knows that it would be impossible for them to make and execute an agreement which would have the results sought to be prohibited.

These facts being judicially known to the court, it must be held that the legislature was justified in making the exemptions. Certainly they are sufficient to raise in the minds of this court a doubt grave enough to keep it from saying that it has been made clearly to appear that the exemption is arbitrary, that there is no reason for its existence.

In this connection, permit me to suggest that the moment that the farmer or stock raiser becomes a dealer, the moment he begins to purchase the products of his neighbor farmers for the

purpose of dealing in them, he comes within the operation of this statute. Of this counsel for appellee most bitterly complain. Instead of it furnishing them any ground of complaint, it ought to excite their commendation, because it puts all dealers, whether they are farmers or not, upon precisely the same footing. If a merchant buys the products of the countryman's farm, he is prohibited from making an agreement which would destroy competition or fix a standard price at which he may sell them. The farmer who does that is in exactly the same situation. If the merchant has a farm, and raises farm products for sale and proceeds to sell them, the law does not apply to him as to those products, because he has raised them. The farmer is upon precisely the same basis. The same may be said of all other occupations. If they raise the farm products, the law does not apply to those products so raised. It is clear, therefore, that the statute applies to all persons similarly situated, and operates uniformly upon all under like circumstances.

Keeping in mind the fact that the statute was passed to protect consumers from the combinations mentioned therein, it becomes more apparent that the exemption of farm products in the hands of those who produce them, and live stock in the hands of those who raise them, does not vitiate the statute. It is well known to every one that the farmers do not sell their products directly to the consumer. Their surplus is always sold to dealers. Of course there are exceptional instances when small quantities may be sold to consumers, but as a rule the farm products are sold to dealers. They sell their live stock to drovers; their grain and other products are sold to dealers, who in turn sell them to the consumer.

For the reasons above given, the dealers need no protection from the farmers, because the farmers are unable to make and execute agreements which would be hurtful to the dealers; and as before suggested, they have never been known so to do. But the dealers can easily combine, as the history of the times has often demonstrated. It is to prohibit combinations of dealers in fixing prices or destroying competition that this statute was passed. Agreements made by wholesale dealers with those engaged in the retail business is a matter of common notoriety. There is scarcely a lawyer in the practice who has not

been called upon to examine and advise his client with reference to these cases. The reports of the supreme courts of every State in the Union contain decisions where said contracts have been made the basis of controversies. They are easily divisible into two classes: (1) Those in which the wholesale dealers require the retail dealers to purchase from them alone, thus by contract making competition impossible, and of course thus enabling the wholesale dealer to fix the prices at which he sells to the retail dealer. The retail dealer is compelled to make a profit or go out of business. The wholesale dealer thus indirectly fixes the prices at which the retail merchant sells to the consumers. (2) The wholesale dealers reserve the right to fix the price at which the retail dealers to whom they sell shall charge their customers and in this way they destroy all competition. To illustrate this, I made a statement of an actual agreement admitted in evidence in a case tried by the counsel in this case, viz., State of Texas vs. Waters-Pierce Oil Company; in describing the agreement therein alluded to I possibly made a technical mistake; my statement will bear the construction that the Waters-Pierce Oil Company, as such, entered into the original Standard Oil Trust. This was a technical error. The Waters-Pierce Oil Company did not sign the agreement in its own name, but it is recognized in the original Standard Oil Trust agreement as having signed by its *stockholders*. With this correction, the statement made in the original brief is correct, and counsel for appellee will not deny it. As to whether it is a proper matter for this court to consider or not, neither myself nor counsel for appellee are the best judges. If it is not proper, the court will not consider it; if it is a proper subject for consideration in this case, it is here for whatever it may be worth. The agreement referred to will be printed in the literature of the profession as soon as the case above mentioned can be officially reported. I had not supposed that there would ever be any controversy about it, or that counsel for the appellee would object to the statement here of what will be printed in the Texas court reports, and be distributed among all the courts of the land, including this, for use by bench and bar. The statement was not made with a view of giving this court

evidence upon which to act, but simply to illustrate the conditions which this court judicially know to exist.

The trial judge in his opinion filed, held that the act in question *made criminal all associations for business purposes.* This point is seized upon by counsel for the appellee, and is made the basis of an ingenious argument. The contention is that the definition of a trust given in the statute includes all partnerships, firms and corporations. In other words, the argument is based upon only a part of the definition given by the statute. The statute makes combinations illegal only when they are organized for the purposes therein named. An ordinary partnership or corporation, or business association, is not formed *for the purpose* of creating restrictions in trade, not to limit or reduce the production, or increase or reduce the price of merchandise or commodities, nor to prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities. Nor are they organized for the purpose of fixing at a standard figure the price of any commodities to the public whereby the price of such commodity may be controlled or established. Nor are they organized for the purpose of entering into or carrying out any contract, obligation or agreement of any kind or description by which they will have bound themselves not to sell dispose of or transport any article of merchandise, nor to sell it below a standard figure. The ordinary and usual purpose of a partnership is not to impose restrictions upon trade, not to fix a standard price, or destroy competition. Partnerships are ordinarily formed for the purpose of carrying on trade—*extending* it, rather than restricting it. They are entered into not for the purpose of destroying competition or fixing standard prices, but because their joint capital and combined skill are necessary for the transaction of the particular line of business.

Bates' Law of Partnership, Sec. 1.

Kent's Commentaries, 23.

Anderson's Law Dictionary, p. 749.

Or, as Stroud puts it, "A partnership is an agreement that something shall be attempted with a view of gain, and that the gain shall be shared by the parties to the agreement."

Stroud's Dictionary, title, Partnership.

Bouvier defines it as "An agreement between two or more persons for joining together their money, goods, labor, or skill, or either or all of them, *for the purpose of advancing fair trade*, and of dividing the profits or losses arising therefrom proportionally, or otherwise, between them."

Bouvier's Law Dictionary, title, Partnership.

There is a vast difference between "advancing fair trade" and restricting fair trade. They are just the opposite.

A corporation is but a different form of partnership. It is an artificial person created of several natural persons, whose status is clearly defined by law. It is likewise organized for the purpose of prosecuting some business. This view is emphasized by the further fact that the statute in question recognizes the legal existence of firms, corporations and associations of persons. In other words, it makes illegal the combination of two or more persons for any of the illegal purposes named in the statute. It likewise makes illegal the combination of two or more firms, of two or more corporations, or two or more associations of persons, for any of the unlawful purposes named. It is clear that it never entered the legislative mind that the existence of corporations, partnerships or business associations, would be thereby prevented. If such had been the intention of the legislature, it would have said so in plain and explicit terms. I called attention in the original brief to the fact that at various times since the passage of this statute, the legislature of Texas has further recognized the existence of corporations by amending the corporation laws. This has been pointed out on pages 34 and 35 of the brief. Moreover, the Supreme Court of the State, as shown in the brief, page 36, has held in substance, that the statute in question was intended *only* to prevent the combination of capital, skill or acts for *any of the purposes named in the statute*. The purpose of the act was to prevent the destruction of competition. That is the decision of the Supreme Court of the State. That decision should be held conclusive on this point. But it was not intended to accomplish any other result. Learned counsel for the appellee insist that it is immaterial whether a corporation or partnership are formed for the purposes named in the statute or not. That the motive of the partnership cannot always be as-

certained except by the results. They invoke the old legal maxim that every person is presumed to intend the reasonable and probable results of his own action. They insist that the reasonable and probable result of a partnership, firm or corporation is to create restrictions in trade and destroy competition; and, therefore, that persons forming such corporation or partnership must be presumed to have formed them for that purpose. The logic is faulty. I deny that the reasonable or probable result of forming a corporation or partnership is to create restrictions in trade, destroy competition, or do any acts which the statute sought to prohibit. Take any town or city in the United States in which one dozen firms are doing business. Does it make competition any less because this dozen mercantile establishments are conducted by firms or corporations rather than each by a separate individual? Are there not twelve competing factors in each of these towns or cities, as the case may be, and whether the entities that make these factors are artificial persons, that is to say corporations, or whether they are partnerships, is not the competition the same? To illustrate further, suppose that a town has twelve business partnerships in it. Would it increase the competition for one person to retire from each of these twelve firms? Would it enlarge the trade? It seems not. Let us put it another way. Suppose twelve men are engaged in the mercantile business in a town, each in competition with the other, and conducting an establishment of his own. Suppose each of these takes unto himself a partner, which makes the number that is engaged in the mercantile business in that town twenty-four. Has the trade been restricted? Has competition been destroyed or even lessened thereby?

I grant that it is possible to create a partial restriction in trade by the formation of a partnership, but the restriction would only be temporary. Competition would come again. But a man is not presumed to intend the *possible* results of his own action. If partnerships were destroyed it might result in destroying competition to a greater extent than their existence could possibly do. To illustrate: Suppose A and B desired to enter into a mercantile business in competition with a firm already in existence. Neither A nor B have sufficient capital to conduct the business, but combined they can make it successful.

If they are prevented from forming the partnership competition will not exist. But if they are permitted to form the partnership, competition will be created. It is plain, therefore, that instead of partnerships creating restriction in trade, they are absolutely necessary in some instances to create competition in trade. The same may be said of corporations, or any other business association. Suppose that it be sought to build a railway through Texas which would be parallel and in competition to a line already in existence. No individual can build this road; a corporation is necessary to accomplish that purpose. If the corporation can be organized the competing railroad can be built. If a corporation cannot be organized competition becomes impossible. It must follow, therefore, that the major premise of appellee's counsel, to the effect that the formation of partnerships and corporations create restrictions in trade, is erroneous. Therefore the conclusion deduced therefrom to the effect that the statute was designed to prevent the ordinary business association is erroneous.

I have no doubt that it is possible to create temporary restrictions in trade by the formation of partnerships or corporations. It is possible for two merchants living in the same town to form a partnership, and in that way destroy competition between themselves. But if there is room for another merchant, if the trade will justify it, he will come, and the result will be beneficial rather than hurtful to the community, in that it will give the particular village or town sufficient capital and skill to carry on the trade. Neither of these two merchants, left by himself, might be able to successfully conduct the business of the character which the needs of the particular community would demand. If it be conceded that the possible result of the partnership or corporation be to create restrictions in trade, still it will not follow that the people forming the partnership must have intended such a result. The rule, when most strictly applied, is that people are only presumed to intend the reasonable and probable result of their own action, but they are not always held responsible for the possible results of their own action. Take the New York Central Railroad. It was built for the purpose of transporting freight and passengers. It was a necessary aid to commerce. It was well known, however, when

it was constructed, that accidents were possible, and that the operation of the railroad would *possibly* result in loss of human life. It could not be said, however, that because that is one of the possible results, that the corporation was created for that purpose. Take a banking corporation. It is formed for the purpose of gain. All of the stockholders expect to increase the amount of their worldly goods by reason of their business venture. But conditions become such that the business is conducted at a loss. That is always possible. Must it be said that the stockholders entered into this corporation for the purpose of losing their money, because such a result was possible? Surely such a contention approaches the absurd, yet is the position of appellee.

But I will not pursue this subject further. I respectfully submit that the act was not intended by the legislature to prevent the formation of corporations, partnerships or business associations for any lawful purpose:

1. Because the language of the statute itself recognizes their lawful existence, and only seeks to prohibit them from the accomplishment of the purposes therein designated.

2. Because the legislature, both before and after the passage of this act, in several special enactments, attention to which has been called in the brief heretofore filed, recognized the lawful existence of corporations.

3. Because the Supreme Court of the State of Texas, in the case of Gates vs. Hooper, 39 S. W. Rep., p. 186, have substantially held in accordance with the contention of appellant herein, and that decision is conclusive on this court on the question of legislative intention.

4. Because the corporations, partnerships and business associations are not ordinarily formed for any of the purposes which the statute seeks to prohibit.

5. Because the accomplishment of any of the purposes sought to be prohibited by the statute is not the necessary, reasonable or probable result of the formation of corporations, partnerships and business associations, and therefore those who form them cannot be held to intend such results.

M. M. CRANE, Att'y Gen'l,
Attorney for Appellant, John W. Baker, Sheriff, etc.

Nos. 336, 337, 338 & 339

Add'l Br. of Crane for Appt.

Filed Jan. 28, 1898.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

Nos. 336–339.

JOHN W. BAKER, SHERIFF, &c.,

vs.

WILLIAM GRICE ET AL.

ADDITIONAL AUTHORITIES AND PROPOSITIONS ON BEHALF OF APPELLANT.

The application of appellee was wholly insufficient, in that it stated conclusions and not facts. It did not show that appellee at any time applied to the State court for a trial or sought to have a day fixed for his trial, and hence did not show that a speedy trial was denied him.

Whitten *vs.* Tomlinson, 160 U. S., 242.

Ex parte Walpole, 84 Cal., 584.

Ex parte Nye, 8 Kans., 99.

Ex parte Dewy, 10 Nev., 212.

Voluntary surrender into the hands of the sheriff for the purpose of suing out the writ of *habeas corpus* is voluntary confinement, and is sufficient to deny him relief, and does not authorize the issuance of the writ of *habeas corpus*. It is no case of peculiar urgency. (Wales *vs.* Whitney, 114 U. S., 564.)

The sufficiency of the indictment was not made a question in the court below. If it was it has been expressly waived in this court. (Appellee's Brief, by Messrs J. D. Johnson and George Clark, page 9.)

Defects in the indictment may not be inquired into by *habeas corpus*.

Ex parte Whitaker, 43 Ala., 323.
Emanuel *vs.* State, 36 Miss., 627.
Davis case, 122 Mass., 324.
In re Kowalsky, 73 Col., 120.
Church on *Habeas Corpus*, sec. 246.

The guilt or innocence of the party cannot be inquired into.

Church on *Habeas Corpus*, sec. 247.
Concems *vs.* People, 18 N. Y., 129.

The exemption of agricultural products and live stock while in the hands of the producer or raiser does not vitiate the statute.

Soon Huy *vs.* Crowly, 113 U. S., 703, 708.

A prisoner will not be discharged in doubtful cases. The right must be clear.

Church on *Habeas Corpus*, 123.
Ex parte Crouch, 112 U. S., 178.

Neither the Texas Code of Criminal Procedure nor the decisions of the Texas courts cited by appellee justify the propositions made by him, that confinement is unnecessary in order to obtain the writ of *habeas corpus* from a State court; but if they do they are not applicable, because this court is not asked to administer the State statute, but the Federal law.

Wales *vs.* Whitney, *supra.*

Respectfully submitted.

M. M. CRANE,
Attorney General, Counsel for Appellant,
The State of Texas.

No. 336.

Brief of Clerk for Appellee

FILED
SEP 27 1897
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

October Term, 1897.

No. 336.

JOHN W. BAKER, SHERIFF, ETC., APPELLANT,

vs.

WILLIAM GEICE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLEES.

JOHN D. JOHNSON,
GEO. CLARK,
B. C. BOLINGER,
Of Counsel for Appellee.

J. M. SHARP, PRINTER AND STATIONER, WACO.

—IN—

THE SUPREME COURT

OF THE UNITED STATES.

October Term, 1897.

No. 758.

JOHN W. BAKER, SHERIFF McLENNAN COUNTY, TEXAS, APPELLANT,

VS.

WILLIAM GRICE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellee is not able to concur in the statement of the case as presented by appellant in his brief, in that in the judgment of appellee such statement of the case by

appellee does not present a full history of the case. Appellant, therefore, submits the following statement of the case:

This appeal is from a judgment of the Circuit Court of the United States for the Northern District of Texas, rendered on a writ of habeas corpus duly issued by said Court upon the application of appellee on December 9, 1896, while said Court was holding its term at Waco, in the State of Texas. (R. pp. 65-66.)

The petition for said writ of habeas corpus set forth that petitioner was a citizen of the United States, and resided in the County of Dallas and State of Texas; that petitioner was unlawfully restrained in his liberty by appellant, Baker, who was the sheriff of McLennan County, Texas, and was held in the custody of said sheriff, petitioner having been surrendered by his sureties under a recognizance taken in the State Court; that petitioner was detained by virtue of a capias issuing out of the District Court of the Fifty-Fourth Judicial District of the State of Texas at Waco upon an indictment preferred in said Court against petitioner and other citizens of the United States on, to-wit: The 21st day of November, 1894, said indictment and prosecution being numbered on the criminal docket of said Court as number 871, and entitled, "The State of Texas vs. John D. Rockefeller, et al," which indictment charged that John D. Rockefeller, Henry M. Flagler, John D. Archbold, Benjamin Brewster, Henry M. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finlay, C. M. Adams, J. P. Gruet, E. Wells, William Grice, F. A. Austin and E. T. Hathaway did unlawfully agree, combine, conspire, confederate and engage with William E. Hawkins and divers other persons to the grand jurors unknown in McLennan county, Texas, in a conspiracy against trade then and there, and with the said William E. Hawkins and said other persons

creating a trust by a combination of their capital, skill and acts with the said William E. Hawkins and other persons for the purpose, design and effect to create and carry out restrictions in trade. (R. 2.) This indictment is set out in full in the record. (R. pp. 8-18.)

Petitioner alleged that said indictment was founded upon an Act of the Legislature of the State of Texas, entitled, "An Act to define trusts and to provide for penalties and punishment of corporations, firms and associations of persons connected with them and to promote free competition in the State of Texas," approved March 30, 1889, which Act was a public law of the State of Texas. (R. 2.) He further alleged his arrest and entry into recognizance before said Court conditioned for his appearance therein from day to day, and from term to term, to answer said indictment, and that thereafter, to-wit: On December 2, 1895, the case was called for trial, whereupon the defendants who had been arrested, to-wit: E. T. Hathaway, William Grice, F. A. Austin, Arthur M. Finlay and William E. Hawkins severed, and in accordance with the laws of Texas, E. T. Hathaway, his co-defendant, was placed on trial; that thereupon said Hathaway, through counsel, filed and presented his exceptions to the sufficiency of the indictment in the nature of a motion to quash as at common law, in which was set up and presented the following causes of exception among other things, to-wit:

3. Because the Act of the Legislature of the State of Texas, of March 30, 1889, aforesaid, was violative of the Constitution of the United States, for the reason that said statute discriminated between different classes of citizens of the United States and denied to certain citizens the equal protection of the law, and proposed to deprive certain citizens of the United States of their

liberty, property, privileges and immunities in a way other than by due course of the law of the land.

6. Because said indictment showed upon its face that the parties presented were engaged in inter-state commerce within the meaning of the Constitution and laws of the United States, and the District Court of the Fifty-Fourth Judicial District had no jurisdiction of any such matters. (R. p. 3.)

The Court overruled these exceptions and thereupon a trial was had before a jury, which resulted in a verdict of guilty as to said Hathaway, on the 12th day of December, 1895, his punishment being assessed at a fine of $50.00, which verdict was received and judgment duly entered, and thereafter the said Hathaway in his motion for new trial and in arrest of judgment, set up the same objections to the constitutionality of said statute as were set up *in limine,* which motions were overruled by the Court and sentence passed upon said Hathaway, from which judgment and sentence appeal was perfected by said Hathaway, to the Court of Criminal Appeals of the State of Texas, on various assignments of error, including the unconstitutionality of said Act of the Legislature. (R. pp. 3-4.)

Petitioner further alleged that under the provisions of the code of criminal procedure of the State of Texas, and of the laws of said State, said conviction was for a felony, notwithstanding the pecuniary fine imposed, and under said laws of Texas the defendant, Hathaway, was not permitted to appeal upon recognizance, but was forced to submit to confinement, pending appeal, in the common jail of McLennan County, Texas; that said appeal was prosecuted with diligence and upon the assignments of error recited; that said appeal was not determined until the 24th day of June, 1896, and in the meanwhile the said Hathaway, co-defendant, was incar-

cerated in the common jail of McLennan County, Texas, in the companionship of thieves and felons awaiting the result of said appeal; that in the decision of said appeal said Court of Criminal Appeals declined and refused to decide upon the exceptions to the sufficiency of the indictment aforesaid, or to pass upon the Constitutional questions raised, although they were assigned for error and duly presented and argued, but decided said appeal upon a technical ground of pleading, holding, in effect, that because the indictment presented in said case had failed to charge Hathaway with having *knowingly* carried out, as agent, the stipulations, purposes, prices, rates or orders of said alleged conspiracy, that no evidence to that effect was admissible, and that the Court erred in admitting any evidence, and for said reason chiefly, said judgment was reversed and cause remanded to said District Court of the Fifty-Fourth Judicial District for a trial *de novo*. (R. pp. 4-5.) The opinion of the Court of Criminal Appeals in said case is set forth at length in the printed record herein. (R. pp. 53-65.)

Petitioner alleged that since the rendition of said judgment by said Court of Criminal Appeals, two terms of the District Court of the Fifty-Fourth Judicial District had been held, one of which was then nearing its close, and that while petitioner, with his co-defendants, had stood ready and anxious for trial, yet the case had not even been called by the Court for trial, nor had it been set for trial, but the same had been permitted to remain upon the docket of said Court, subjecting the petitioner and his co-defendants to the shame of an indictment for felony, but denying to him and them the right to be heard in his defense in said Court as a citizen of the United States, and leaving him and his co-defendants without remedy in the State Courts for the assertion and vindication of their rights under the Constitution of the United States. (R. p. 5.)

Petitioner further alleged that on November 24, 1896, Hathaway, his co-defendant, sued out a writ of habeas corpus before the Circuit Court of the United States for the Northern District of Texas, which writ of habeas corpus on the same day was served upon Baker, appellant, herein, the sheriff, and that he, the said Baker, on the same day made return to said Circuit Court of the United States that he held the body of Hathaway by virtue of a capias issued upon the indictment hereinbefore described, for violation of the Anti-Trust Statute of the State of Texas, enacted and approved on March 30, 1889; that the cause was set for hearing by said Circuit Court of the United States, at Waco, for December 7, 1896, and due notice was issued to the respondent, Baker, and to the prosecuting officers of McLennan County and the State of Texas, duly advising them of such proceedings; that for reasons unknown to petitioner, but for reasons which petitioner believed were obviously for the purpose of defeating the jurisdiction of said Circuit Court of the United States, and preventing said Court from passing upon the Constitutional rights of Hathaway, said prosecuting officers on the day on which the habeas corpus was to be heard in the Circuit Court of the United States, to-wit: December 7, 1896, went into the District Court of the Fifty-Fourth Judicial District, and, with the consent of said Court, dismissed said indictment as to Hathaway, but leaving the same to stand unimpaired and unaffected as to petitioner and the other co-defendants, and thereafter on the same day, to-wit: December 7, 1896, Baker, the appellant, sheriff, filed an amended return to said writ in the Circuit Court of the United States, submitting a copy of the judgment of dismissal in the State Court, and certifying that by reason thereof, he, Baker, had and claimed no further right or custody over the relator, Hathaway, and thereby the jurisdiction of the Circuit Court of the United States was substantially terminated. (R. p. 6.)

That petitioner was advised by counsel and so averred that said Act of the Legislature of the State of Texas, approved March 30, 1889, is violative of the Constitution of the United States for the reasons stated in said exception to said indictment; that said Act discriminates between different classes of citizens of the United States and denies to certain citizens and classes of citizens the equal protection of the laws; that it deprives certain citizens and classes of citizens of the United States of their liberty, privileges and immunities in a way other than by due course of the law of the land; that it otherwise attempts to justify and exercise extra-territorial jurisdiction on the part of the State of Texas over citizens of the United States residing in other States of the American Union, and over acts done in other States of the American Union, and over which the State of Texas can have no possible jurisdiction; and that said Act and the indictment against petitioner was an attempt to interfere with inter-state commerce in violation of the Constitution of the United States. (R. pp. 6-7.) Petitioner alleged by reason of the premises that he was without remedy for the assertion or vindication of his rights as a citizen of the United States under the Constitution; that he had stood under the indictment for felony for a period of two years without being afforded an opportunity in the State Courts of Texas for the assertion of his rights as a citizen of the United States; that he believed and so averred that it was the purpose and intent of the prosecuting authorities of the State of Texas to prevent, if possible, any appeal by him to the Courts of the United States for the vindication of his rights as a citizen; and that without the interposition of said Circuit Court of the United States for his protection and the preservation of his rights as a citizen of the United States, he was practically remedyless by appeal in the regular course or otherwise. (R. p. 7.)

Petitioner prayed for writ of habeas corpus and

attached, as exhibits, to his petition the following papers, to-wit:

1. Copy of the indictment preferred in said cause.

2. Copy of the judgment of the District Court of the Fifty-Fourth Judicial Districts, adjudging Hathaway guilty.

3. Copy of the brief and argument of Hathaway's counsel in the Court of Criminal Appeals of the State of Texas.

4. A copy of the opinion of said Court of Criminal Appeals of the State of Texas. (R. pp. 7-8.)

The writ of habeas corpus was issued, as aforesaid, on December 9, 1896, and on the same day, Baker, appellant, the sheriff of McLennan County, Texas, made return to said Circuit Court of the United States, producing, in open Court, the body of petitioner, appellee, and certifying that he held him in custody by virtue of a capias issued out of the District Court of the Fifty-Fourth Judicial District of the State of Texas, upon an indictment preferred in said Court in a certain criminal case, numbered 871, The State of Texas vs. John D. Rockefeller, et al., which indictment charged him with conspiracy against trade in violation of the Act of March 30, 1889. (R. p. 66.)

On December 11, 1896, on motion of respondent, Baker, appellant herein, the cause was transferred for trial to a term of said Circuit Court of the United States to be holden at Dallas, Texas, on January 11, 1897, and on said last named day appellant, Baker, sheriff, filed an amended return, which is correctly set forth by appellant in his brief. (R. pp. 68-72.)

Appellee filed his replication to said amended return, demurring to portions thereof, and denying other portions. (R. pp. 72-73.)

On February 22, 1897, during said term of said Circuit Court, at Dallas, said Court entered its judgment discharging appellee from custody, for the reasons stated in an opinion filed in said cause, which opinion and judgment may be found in the record. (R. pp. 75-101.)

Respondent, Baker, sheriff, perfected an appeal from said judgment, discharging appellee and assigned errors as stated in appellant's brief.

BRIEF.

There are but two questions to be determined by this Court upon this appeal, which are as follows:

1. Did the Circuit Court of the United States for the Northern District of Texas, err in assuming and exercising jurisdiction by way of habeas corpus in advance of a trial by the State Courts?

2. Is the Act of March 30, 1889, violative of the Constitution of the United States?

These two questions will be discussed herein as an answer to the elaborate brief of appellant's counsel.

I.

ON THE QUESTION OF JURISDICTION.

We submit for appellee the following proposition:

The jurisdiction of the United States Courts and judges to issue writs of habeas corpus in cases where a citizen is illegally restrained of his liberty by State process, either before or after conviction in the State Court, in violation of the rights and immunities conferred upon citizens by the Constitution of the United States, is established and undoubted. The usual course for a citizen so restrained to assert his rights under the Constitution is by appeal from the trial Court

to the highest Court of the State, and thence in case of an adverse decision, by writ of error to the Supreme Court of the United States. This course of vindication should be usually followed. But if for any reason such course is obstructed or is inconvenient, or would involve peculiar hardship upon the relator, then and in that event the jurisdiction should be exercised by the Federal Court to which application is made and prompt and speedy relief afforded the relator.

This proposition, in view of the long line of decisions by this Court, has become *axiomatic*.

Rev. Stat. U. S., Sections 751, 752, 753, 754, 755, et seq.
Ex-Parte Royal, 117 U. S., 241.
Ex-Parte Fonda, 117 U. S., 516.
In re. Coy, 127 U. S., 731.
Ex-Parte Medley, 134 U. S., 160.
Ex-Parte Frederick, 149 U. S., 70.
Whitten vs. Tomlinson, 160 U. S., 231.

The duty of guarding and preserving the Constitution of the United States is one peculiarly devolved upon the Federal judiciary. It is true this Court has said more than once that it must be presumed that State Courts, being Courts of the American Union, would protect all the rights of citizens, whether under the State or Federal Constitution. But this, at best, is but a presumption, perhaps ordinarily correct, but subject, in exceptional instances, to rebuttal like any other presumption. The case at bar is peculiarly a case arising under the Constitution of the United States. It is not an attempt to revise proceedings or decisions of a State Court. It was not attempted, in this case, to make the writ of habeas corpus operate in any manner as a writ of error. No complaint is made by appellee, who was the relator

below, as to any action of the State Courts in the progress of this prosecution except that the highest Court of the State of Texas, having criminal jurisdiction, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants as citizens of the United States, under the Constitution thereof, and that he was unable to get a trial. The record here abundantly demonstrates, and without contradiction on the part of appellant, that an honest attempt was made to have the rights of this appellee and his co-defendants under the Constitution of the United States, and as citizens thereof, determined and adjudged by the highest Court of the State of Texas having criminal jurisdiction, in which they were unsuccessful. This record also shows that under the laws of the State of Texas, the crime of which appellee stood charged in the State Court by indictment, was a felony, and that under said laws of the State of Texas, in case of conviction of appellee, he would be forced to lie in the common jail in company with thieves, murderers and other felons and await the result of said appeal, no matter what length of time such decision might be delayed.

Counsel for appellant have endeavored to obscure the issue as to jurisdiction by a lengthy argument directed to the point that appellee has never had a trial; that his case is entirely distinct from that of Hathaway; that he has never made any attempt to present to the State Court his defenses as to the unconstitutionality of the Act of March 30, 1889, and a great deal more upon that line. Counsel should not mistake the issue nor endeavor to mislead the Court as to the issue. Hathaway has been eliminated from this case. He was indicted originally with appellee and others, submitted to conviction, appealed his case. The conviction was reversed. The State Court refused him another trial. He applied to the United States Circuit Court for his writ of habeas

corpus, and on the day such writ was to be heard the prosecuting officers of the State, as alleged in the petition for habeas corpus, procured a dismissal of the prosecution as to him, for the very purpose of preventing an appeal to the Circuit Court of the United States, or a decision as to the constitutionality of such statute. As said before, this is not a procedure for the purpose of reviewing the action of the State Court in the Hathaway case. It is not a procedure for the purpose of enabling the United States Circuit Court to determine whether the State Court did right or did wrong. The question is simply this: Has the appellee and his associates made an honest attempt in the State Court to have their rights adjudicated under the Constitution of the United States, and have they failed in such attempt? coupled with the further question: Do the facts at bar show a case of peculiar urgency, justifying a Court or judge of the United States upon a writ of habeas corpus, to determine the validity of appellee's arrest and detention? The substantial facts stated in the application for the writ are not denied by the return. It is not denied that these appellees here together with Hathaway, were indicted as charged; nor that such indictment was based upon the Anti-Trust Act of the State of Texas, of March 30, 1889; nor that these appellees were arrested; nor that Hathaway was tried and convicted; nor that he, by his counsel, in behalf of himself and these appellees, raised objections to the constitutionality of said statute, which were determined against him in the trial Court; nor that he appealed his case to the Court of last resort in the State of Texas in criminal matters, and again urged his objections to the constitutionality of said statute; nor that the Court of Criminal Appeals failed and refused to decide the question, though practically deciding it adversely to appellee by remanding the case for trial *de novo;* nor that the appellee and his associates have ever since said reversal

and during two terms of said State Court stood ready and anxious for trial dancing attendance upon said State Court, from day to day and from term to term in accordance with the requirements of their several recognizances; nor that said State Court refused to bring them to trial; nor that said case against appellee was never called for trial. These facts are incontrovertible. The question is, do they present a state of facts which would justify a Federal Court in intervening by writ of habeas corpus in order to vindicate rights of citizens of the United States under the Constitution of the United States?

Counsel for appellant also misstates the decision of the Court of Criminal Appeals of the State of Texas. It is true that said Court decided that the State, by its testimony, on the trial of Hathaway, failed to reach defendant with any evidence even tending to show that he was an original conspirator, or that he entered into a conspiracy in restraint of trade (R. p. 62;) but the gist of the decision was placed by that Court upon a different ground, to-wit: That it was developed that Hathaway and appellee were mere agents of the Waters-Pierce Oil Company in Texas, and the indictment having failed to charge said agents with having *knowingly* assisted in furthering the purposes of the trust, no evidence was admissible thereunder against them, such indictment being fatally defective. The language of the Court is thus: "If appellant, (Hathaway), had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment. To hold him responsible as an agent, the indictment must allege the fact that he knew of the conspiracy and its purposes." (R. p. 63.)

The immensity of space covered by counsel for appellant in discussing the assumption, not justified by the

record, that the Hathaway case was reversed because the evinence did not support the finding of the jury, is not tenable. The reversal, as stated above, was upon a different ground, and the argument of appellant upon that branch of the case falls to the ground. With the light of this opinion of the Court of Criminal Appeals before them, the prosecuting authorities of the State of Texas, and the judge of that State Court still held to this indictment and still refused to try the defendants, including this appellee. This is not denied. They are charged with knowledge derived from this opinion that they could not convict appellee under that indictment, for this was settled by the opinion. Notwithstanding this fact, they made no attempt to find a new indictment, nor any effort to bring to trial these parties, defendant. They left them to stand in the pillory of public condemnation under an indictment for felony, and as said before, required to dance attendance, from day to day and from term to term, without any prospect of securing their release or of even securing the right of appealing to this Court by writ of error from a decision of the highest Court of the State; because it goes without saying that without a trial in the lower Court there could be no appeal to the Court of Criminal Appeals of the State of Texas. Yet the counsel for appellant derides the case as made and stigmatizes it as a travesty upon justice and absolutely assumes that the time of the United States Circuit Court was uselessly consumed in determining the rights of an American citizen under the Constitution of the United States, because other causes may have been pressing for a hearing. The Constitutional rights of an American citizen seem to be of small concern to counsel for appellant, and the liberty of the citizen under the Constitution, a bagatelle. The idea may be antiquated, but still it obtains with great force with counsel for appellee, that these are the most important questions

that could come even before this high Court, far surpassing in importance any cause involving mere money or property. This appellee did not rush into prison in order that he might get this Court to determine whether a certain State statute is valid, and in the meantime delay all further proceeding by the State Court, but he rushed into a Court of the United States as soon as he ascertained that the State Courts did not intend to afford him protection and vindication. He came to the constituted tribunals of the country, especially organized for the administration of the Constitution and laws of the United States, and the protection of the rights and liberties of citizens of the United States, but he did not come until the acts and doings of the State Courts and State officers admonished him that he was without hope of remedy in State tribunals. The character of trial he could justly anticipate in the State Court, if he ever got one, is beautifully illustrated in the argument of the State's attorney, in Hathaway's trial. (See Record pp. 41-53.)

The leading case of Ex-Parte Royal upon this question of jurisdiction needs no comment in this Court. It establishes most clearly and succinctly the jurisdiction of the Circuit Court of the United States, to furnish the relief prayed for in this instance, and we have searched in vain for any opinion of this Court which qualifies the principles established in the Royal case. Whitten vs. Tomlinson, (160 U. S., 231,) seems to be relied upon by counsel for appellant, as having qualified and restricted the meaning and intent of the Royal case, but we do not so consider it, and the two cases seem to be in perfect harmony. The instances cited by the learned justice who delivered the opinion in the case of Whitten vs. Tomlinson, are not restrictive, but merely illustrative, going to the extent of holding as was held in the Royal case, more as a matter of comity than otherwise,

the rule had been established by the decisions of this Court that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a Court or judge of the United States, upon a writ of habeas corpus, but that he should be remitted to the ordinary procedure, to-wit: An appeal to the highest Court of the State, and thence by writ of error to this Court. But it is to be noted that the opinion in the last named case at its conclusion contains most significant language. The learned justice says:

"There could be no better illustration than this case affords, of the wisdom if not necessity of the rule established by the decisions of this Court above stated that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a Court or judge of the United States, upon a writ of habeas corpus *in advance of any proceedings in the Courts of the State to test the validity of his arrest and detention.*"

The record shows in this case a case of peculiar urgency, and it shows that the discharge of appellee by a Court of the United States, upon a writ of habeas corpus, was not in advance of any proceedings of the Courts of the State to test the validity of his arrest and detention. To the contrary, appellee submitted to the jurisdiction of the State Court, for more than two years, without complaint. He and his associates made every effort in the State Courts to test the validity of his arrest and detention, because the decision of the Hathaway case as to the Constitutional question involved, was necessarily a decision of the case of appellee. The two were inseparable. If Hathaway was entitled to his discharge by reason of the Constitutional objections to the statute in question, necessarily the discharge of appellee followed as an inevitable conclusion. They were indicted together for the same offense. They were

both agents of the Waters-Pierce Oil Company. The indictment was fatally defective as to both. There could be no conviction of either in the State Courts upon said indictment, but still the authorities of the State of Texas held them in durance vile without an effort to bring them to trial. But to the contrary, as is apparent from the record, a studious determination not to let them have a trial. How long must an American citizen be denied his right to an adjudication as to the validity and legality of his imprisonment? How long must an American citizen dance attendance upon a State Court, and await its pleasure in the adjudication of his right to liberty?

The urgency in this case is further best illustrated by the fact that, in the opinion of the Court of Criminal Appeals, (R. pp. 53-65), that Court, in refusing to pass directly upon the Constiutional questions, employed this language:

"There are some Constitutional questions raised in this case. Some of the questions have been before our Supreme Court and it has been decided by that tribunal that the law in question is Constitutional. It is claimed by the appellant, however, that the decision is obiter, and, moreover, that the decision of the question by that tribunal is not binding upon us. While the presumption will be indulged that the decision of the Supreme Court is correct, yet a discussion and decision of the question in the view we have taken is not necessary in determining this case. This question has been before the Supreme Court in the following cases: Anheuser-Busch Brewing Association vs. Houck, 27 S. W. Rep., 696; Houck & Deiter vs. Anheuser-Busch Brewing Association, 88 Tex., 184; T. & P. Coal Co. vs. Lawson, 34 S. W. Rep., 919, and Walsh vs. Windmill Co., recently decided.

Because the Court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict, the judgment is reversed and the cause remanded." (R. pp. 64-65.)

The first and leading case decided by the Supreme Court of Texas, upon the question, is Anheuser-Busch Brewing Association vs. Houck, 30 S. W., 869. This case arose in one of the counties of the Fourth Supreme Judicial District; in passing upon that case on appeal, the Court of Civil Appeals, for that district, used this language:

"The constitutionality of the Act of 1889 is not raised in the brief, and we perceive no objection to it in that respect. The question was raised in the case of Insurance Company vs. The State, (24 S. W. Rep., 397), but was found not necessary for its decision. The objection there pointed out, which seems to be the only one to suggest itself, is the clause exempting from its provisions, all agricultural products and live stock while in the hands of the producer. This is said to make the Act class legislation. It is apparent that all persons of every class, upon whom the Act proposes to operate, are treated without distinction. This feature of a general statute is held to be the test of whether it is or not obnoxious to that objection, and we believe the Act to be valid. Railway Co. vs. Mackey, 127 U. S., 205."

In passing upon the case, on writ of error, the Supreme Court of Texas used the following language:

"For the reasons given by the Court of Civil Appeals, we also agree with them, in holding that the Act is not in violation of the Constitution." (30 S. W. Rep., 869.)

It will be perceived from this that the Supreme Court of Texas decided that the statute was constitutional

without argument, and without the question having been raised by counsel. A similar condition of affairs confronts us with reference to the other Texas cases cited by appellant on page 67 of his brief. In T. & P. Coal Co. vs. Lawson, 34 S. W. Rep., 919, the Supreme Court of Texas went to the extent of holding that a landlord, in case he rented a tenement to a party for the purpose of putting up a saloon, could not enter into partnership with him, in effect, unless he permitted everybody else who wished to, to come upon his land and put up a saloon. Otherwise he was creating a monopoly which was violative of the Texas statute.

So appellee was confronted with this condition of affairs. The question of the constitutionality of the Act of March 30, 1889, had been repeatedly sustained by the Supreme Court of Texas, and was not then an open question in that Court; said Court being the highest Court in civil matters in that State. The Court of Criminal Appeals, which is the Court of last resort in criminal matters, indulged the presumption that the decision of the Supreme Court was correct, and remanded the case for a new trial, notwithstanding the constitutional objections, which was, in effect, a decision adverse to the contention of appellee. While the road of appellee to this high Court may not be said to have been absolutely blocked, yet this condition of affairs amounted practically to the same thing. Under such condition, even had appellee been able to get a hearing in the trial Court, which was denied him, he must perforce have anticipated a similar result upon trial to that accorded Hathaway, his co-defendant; for if said trial Court was pleased to hold Hathaway guilty of felony, when the Court of last resort in criminal matters held that there was not a line of evidence against him, connecting him in any manner, with the trust, what hope could appellee have of another and different decision in

his case? He was called upon to assume, as a fact, that he would be convicted, even if his urgent appeals for a trial should result in securing it. He was then confronted with the further fact, that in case of conviction, he must perforce lie in jail pending appeal to await the result of such appeal in the Texas Courts. Possibly his case might have been reversed like Hathaway's, but this would only have protracted the delay. In case of the affirmance of the judgment of conviction, his remedy as is insisted upon by counsel for appellant, was to remain in jail and come before this Court praying for writ of error from the State Court. This not only takes time, but requires a large expenditure of money. The record shows that appellee was an employe on a salary, and it is to be presumed that he was not possessed of much of this world's goods. So disgrace and imprisonment were inevitable in order to reach what ought to be accessible, most readily, to every American citizen, to-wit: The right to have his privileges and immunities determined under the Constitution of the United States. Apart from this, vast pecuniary and property interests are involved in this determination. The rights of citizens of the United States, under the Constitution, to enjoy equality of trade and privilege with other citizens of Texas, are involved. The liberty of every citizen of the United States is involved. The interests of inter-state trade and commerce is involved. And yet it is seriously contended by counsel for appellant, that notwithstanding all these vast interests, notwithstanding the inevitable suffering and disgrace of appellee, and notwithstanding the determination manifest in the record on the part of the State authorities not to give him a trial, nor permit him to set up in the State Court his rights as a citizen of the United States, under the Constitution, yet his case is a fictitious case involving no urgency, and deserving of reprobation at the hands of this Court.

We can find no better language to express our idea of

the law, governing this particular question, than that employed by a distinguished justice of this Court, while on the circuit, which language is as follows:

"Therefore, it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the State Courts. So it is argued that if it be true that these ordinances are in conflict with the Federal Constitution, the petitioner has his remedy. He can appeal his case from the Police to the District Court; from there to the Supreme Court of the State; and thence to the Supreme Court of the United States. While that is true, yet he has no adequate relief in that way. He is now under sentence, and he cannot appeal without bond. He will be subjected to trial in the District Court, possibly to an inquiry in the Supreme Court of the State, and, finally in the Supreme Court of the United States. He must bear the expense and suffer the delay. This is not a case prior to trial and judgment; it is a case after trial and judgment. He has experimented with the State Court and it has decided against him. While he has, of course, the right of appeal, yet this is a burden, and personally, to him, it is an inadequate protection to say, 'You can appeal and go through that channel to the Supreme Court of the United States.'

"But that is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce and prevent the free exchange of commodities between the citizens of another State and those of this city. Few persons can stand the expense of litigation running through that channel to the Supreme Court. Length of time would pass before the judgment of that Court could be obtained. In the meantime, if these ordinances are enforced, not only against petitioner, but against whoever may see fit to engage in this business, there is an interference with the exchange of commodities between citizens of other

States and those of this city, and the result will be to stop such traffic. Now, when that would be the natural result, and that is declared to be the intent, perhaps, of this legislation, this Court may, in the exercise of its discretion, properly hold, after a case has passed to judgment in the State Court, that the party has a right to a speedy inquiry and determination in the Federal Court as to whether such ordinances are in conflict with the Constitution of the United States. The public, as well as the individual, are interested in the speedy settlement of this matter." (Mr. Justice Brewer, in Ex-Parte Kieffer, 40 Fed. Rep., 400.)

It is worthy of note that in the above cited cause the learned justice considered that the fact that the relator should be required to give bond, pending appeal, was a sufficient burden to justify the interposition of a Federal Court. How much more strongly is the case at bar, in which not even the poor privilege of bail would be allowed appellee, in case of such appeal? In this case, as in that, the State Court has been experimented with and it has decided against the appellee. If appellee's contention be correct, the statute is utterly void for unconstitutionality, and if the Court of Criminal Appeals be correct in its conclusion, the indictment is utterly insufficient to hold appellee to trial and judgment.

We submit, in conclusion, upon the question of jurisdiction, and the exercise of discretion by the Circuit Court of the United States, that the case, as presented, shows one of peculiar urgency, and brings the rights of appellee clearly within the doctrine, as laid down by this Court, in the cases cited, and in numerous other cases, which might be cited. We submit further, that the Circuit Court of the United States exercised a proper discretion in this matter, in granting the writ,

and that as to the question of jurisdiction here and now there is no room for controversy.

Stress seems to be laid by appellant upon the fact that appellee was surrendered by his sureties to the sheriff, previous to obtaining the writ. Counsel for appellant seems to think that because a defendant may be out on recognizance, or bail, that he is a free man. This is about as startling as some of the other doctrine enunciated in his brief, and is consonant with the principle which he seems to advocate between the lines that a State Court can do no wrong, while a Federal Court, at least an inferior one, can hardly ever be supposed to do right. It is no new doctrine in Texas that a defendant upon bail is constantly in a state of commitment. His custody is transferred from the law to his sureties, and upon the execution of their undertaking the sureties stand in the place and stead of the officers of the law. To them the custody of his person is delivered; they are his jailors, and during the time the recognizance is in effect, he is constantly in a state of commitment. (Gay vs. The State, 20 Tex., 507.)

This Court holds the same doctrine, and its language is to the following effect:

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping

prisoner. In 6 Modern it is said the bail have their principal on a string, and may pull the string whenever they please and render him in their discharge." (Taylor vs. Tainter, 16 Wall., 371.

A pertinent inquiry right here is, what business is it of the appellant, how or by what reason, or for what motive the appellant was surrendered into the custody of the law? How does it concern the State either on this hearing or on any other hearing? The giving of bail is a privilege accorded to a defendant, which he may or may not exercise at his own pleasure. He may refuse to give bail and remain in the custody of the law. Or he may determine, after giving bail, that he prefers the custody of the law, and may cause his sureties at his own instance, to return him to that custody for any reason satisfactory to himself, and with which reason the State has no concern, her only concern being that the sureties shall produce him for trial, when called for, or surrender him back into the custody of the law, from which they took him. It can be at least assumed from the record of this case, that the State had no special interest in having him surrendered into the custody of law, for it is apparent that the State never intended to bring him to trial. What did she want with him, except to hold him under the dominion and disgrace of an invalid indictment, based upon a void law? She refused to try him; refused even to place his case upon the call docket for trial; refused to take any step looking toward a trial; and he, an humble citizen, stood in the presence of the majesty of the law utterly powerless, except by pursuing the very method which was pursued, to-wit: By appealing to the Federal tribunals as an American citizen with constitutional rights guaranteed to him and invoke the protection of said Courts. If this be an offense in the eyes of the State authorities, they may make the most of it.

II.

The Act of March 30, 1889, discriminates between different citizens and classes of citizens of the State of Texas, and of the United States, and denies to certain citizens and classes of citizens the equal protection of the laws, in that it prescribes punishments, by way of felony, for certain citizens and classes for acts and omissions, which are authorized and encouraged in other citizens and classes. Such legislation is purely arbitrary, and not a proper exercise of the police power of the State, and are violative of express provisions of the Constitution of the United States.

AUTHORITIES.

G., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150.
Duncan vs. Missouri, 152 U. S., 382.
Harding vs. People, 160 Ill., 459.
Millett vs. People, 117 Ill., 294.
Ex-P. Jentizech, (Cal.,) 32 L. R. A., 664.
State vs. Goodwill, (W. Va.,) 6 L. R. A., 621.
Frover vs. People, (Ill.,) 16 L. R. A., 492.
In re Garrabad, (Wis.,) 19 L. R. A., 858.
State vs. Loomis, 115 Mo., 307.
State vs. Inlow, 128 Mo., 163.
State vs. Walsh, (Mo. Sup. Ct.,) 37 S. W. Rep., 1112.
People vs. Marx, 99 N. Y., 377.
Wally vs. Kennedy, 2 Yerg., 555.
Vanzant vs. Waddell, 2 Yerg., 270-1.
Janes vs. Reynolds, 2 Tex., 252.
Railway vs. Wilson, (Tex.,) 19 S. W. Rep., 913.
Cooley on Cons. Lim., p. 355.
Barbier vs. Connally, 113 U. S., 27.
Yick Wo vs. Hopkins, 118 U. S., 356.
Dent vs. W. Va., 129 U. S., 114.
San Mateo vs. So. Pacific Ry. Co., 13 Fed. R., 733.

The decisions of the Supreme Court of Texas sustaining the constitutionality of this enactment were anterior to the decision by this Court, of the case of the G., C. & S. F. Ry. Co. vs. Ellis, (165 U. S., 150.) The Supreme Court of Texas proceeded upon the idea that the true test as to whether or not this statute was violative of the equality provision of the Fourteenth Amendment was this. If it was apparent that all persons of every class, upon whom the Act proposed to operate, were treated without distinction, then such legislation did not violate the Constitution of the United States. This ruling is in direct opposition to the principle laid down in the Ellis case. (165 U. S., 150.) In that case this Court used this language:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of right which is the foundation of free government."

The Act in question is set forth in appellant's brief, pages 9 to 11, and the particular section of the Act, which, in the judgment of counsel for appellee, vitiates the whole Act, is found in section 13, which reads as follows:

"Section 13. The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

A careful reading of the Act by the Court will demonstrate, without argument, the point intended to be presented herein by appellee. After denouncing as a felony any combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of certain enumerated purposes, such as creating or carrying out restrictions in trade, limiting or reducing the production, or increase, or reduce the price of merchandise or commodities, preventing competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities, fixing at a standard or figure, whereby its price to the public should be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State, or entering into, making, executing or carrying out any contract, obligation, agreement of any kind or description, by which the parties bind themselves not to sell, or dispose of, or transport any article, or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner settle the price of any article or commodity, or transportation between them or themselves, and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, transportation of any such article or commodity, that its price might in any manner be affected; the statute proceeds to provide unusual and startling provisions for its enforcement, specifying particularly in Section 7, that in any indictment for an offense, under the Act, it was sufficient to state the pur-

pose, or effects of the trust, or combination, and that the accused was a member of it, acted with, or in pursuance of it, without giving its name, or description or how, when or where it was created. Again, in Section 8, providing that it should be sufficient in prosecutions to prove that a trust or combination existed, and that the defendant belonged to it or acted for it or in connection with it, without producing or proving any article or agreement of any written instrument; and providing further that the character of the trust or combination might be established by proof of its general reputation as such. After making these stringent general provisions with reference to combinations and trusts the statute, in Section 13, aforesaid, proceeds in practical effect and operation to exempt from its provisions all agricultural products, or live stock, while in the hands of the producer or raiser. This legislative job is a neat one, were it not for the obstacle of the Fourteenth Amendment to the Constitution of the United States. By it the political power of Texas, which is vested in the farmers and stock raisers, have said to all other classes: "We will combine with reference to our products and earnings, but you shall not do this. If you do, the gates of our penitentiaries shall open for you."

The Act is peculiarly framed, and the position is sometimes taken that the exemption does not apply to classes at all in that the farmers and stock raisers are not exempt from the operation of the Act. This argument, however, will hardly hold good in this Court, which has already laid down the principle that the purpose of a statute must be determined by its natural and reasonable effect, regardless of its language. (Henderson vs. The Mayor, etc., 92 U. S., 268); Yick Wo vs. Hopkins, 118 U. S., 373.) We must look, therefore, to the natural and reasonable effect of the exemption, in

order to determine the purpose of this statute, and from that standpoint such purpose is obvious. It must be assumed by this Court that the purpose was to give special privileges to the farmers and stockraisers; and we may add here that like privileges have since been extended to associations of laborers for the purpose of maintaining wages, by a later Act of the Legislature of the State of Texas, amendatory of this Act, approved April 30, 1895. The record in this case shows what the Court, perhaps, will take judicial knowledge of, without the evidence, that the number of farmers, planters, overseers, agricultural laborers, stock raisers, herders, drovers and laborers in the State of Texas by the census of 1890, was 470,049. (R. p. 74.) The voting population of the State is about 540,000. So, practically, 80 per cent of the people of Texas have denounced severe penalties for combinations between others, and have reserved to themseves the right to make such combinations without fear of punishment. Further comment is hardly necessary. But let us look further at the Act, from the standpoint of classification, which seems to be the last ditch of appellant's counsel, and ascertain even from that standpoint whether his contention is correct. Are all persons brought under its influence treated alike under the same conditions? Particular classes of agriculturists and stock raisers, e. g., those who deal exclusively in their own products, are favored, while those who deal in the products of others are discriminated against, no matter how honest and praiseworthy may have been the method of its accumulation. Combinations for the restraint of trade and the enhancement of prices, and the costs of necessaries of life are encouraged, while the annual fruits of the labor of all other pursuits are placed under the ban. The corn, wheat, rye, barley and vegetables, constituting the farmers yearly increase; the beef, pork and mutton of the stock raisers; and the cotton and wool in the hands of the

original producer may all be merged into a trust to the detriment and oppression of the public, whose necessaries of life depend upon these products; but the daily handiwork of the artisan and mechanic, the shoes we wear, the clothing we must procure; the products of the humble blacksmith and the carpenter; the fruits of the labor of the professional man and the manufacturer and the tradesman, are placed by these laws under the ban, and those of such crafts who may attempt to exercise the same privileges with reference to their earnings and property rights as does the farmer or stock raiser are denounced as felons, and placed in stripes. Can this be equality before the law?

A farmer who attempts to deal, by combination, with others in agricultural products taken from his neighbor in satisfaction of a debt, is denounced. The same farmer, for like practice, with his own products, is commended. What difference can there be as to his rights of property in the two cases?

The farmer who rents his land to tenants and receives as rental a portion of the crops cannot combine as to these agricultural products, because he is not the original producer. On the other hand, the farmer laborers, who receive their pay as hirelings in agricultural products, cannot combine, even among themselves; for, in that case, the land owner is the original producer. The owner of a ranch, containing thousands of cattle, may combine with the whole world and raise prices, but the herdsmen in his employ who may choose to take their pay in cattle, become criminals if they dare combine with each other, or even with the original ranch owner, for such a purpose. The cattle raiser can bring his cattle to the town to market. He can combine with the butcher without fear of punishment. But what becomes of the butcher?

These illustrations, which might be multiplied indefinitely, illustrate that appellant, in this controversy, cannot invoke the doctrine of class or class discrimination in defense of such legislation. The phraseology of the Act, and its practical operation, take it beyond the category of class, and demonstrates the viciousness of the purpose.

As a matter of fact, the legislation in question does not apply to particular bodies or associations, but to the mass of citizenship, with certain marked and favored exemptions to the producers of certain classes of property. It does not impose additional liabilities upon certain designated classes or associations, but takes from certain classes, such as merchants, manufacturers, professional men, artisans and mechanics, certain essential rights of property which are guaranteed to two or three other favored classes. All persons brought under its influence are not treated alike under the same conditions, and the legislation furnishes a remarkable instance of discrimination against, and in favor of, certain classes of *property*, the earnings of the laborer and sweat of certain classes, encouraging in some the unbridled exercise of their inalienable rights of contract, and the exercise of all rights of individual liberty as to their earnings, and forbidding, under penalties of infamous crime, a like exercise of the same rights by other classes equally meritorius and deserving of public consideration, and whose vocations are equally promotive of public benefit.

The cases cited under the proposition need no comment, but speak for themselves in absolute and unqualified condemnation of this species of legislation. It has no place in our system of laws and government, and has received the universal condemnation of the bench, Federal and State. This condemnation was established long anterior to the civil war; and the Fourteenth Amendment but emphasized that which was established

by the fathers in 1776, and by our English ancestors five centuries before at Runnymede. The State cannot deprive the citizen of this equality before the law; nor can it under the guise of police regulation, discriminate between the property rights of different citizens. It cannot by pandering to a sentiment which may already be characterized as morbid, destroy equality before the law in a pretended effort to preserve this equality. If the farmers and stock raisers, in Texas, in good faith desire to put down trusts and combinations, in restraint of trade, they must, if they would do no violence to the Constitution, place themselves and their property rights and interests on a level with those of their fellow citizens, whose avocations are not hurtful to society. They cannot put down a few trusts by encouraging the formation of numerous others, more hurtful to the body politic than the public disease they pretend to want to cure. They cannot authorize the formation of trusts in every necessity of life, in the food we eat and the clothing we wear, and thus favor the farmer and stock raiser to the detriment and oppression of other classes of our citizens. The farmer and stock raiser may be entitled to some consideration, but not to the extent of abrogating the Fourteenth Amendment. Equality before the law is a more precious privilege to the American citizen than any office which may be gained by demagogy. As said by this Court, arbitrary selection can never be justified by calling it classification. Or, as said by Mr. Justice Matthews in Yick Wo vs. Hopkins:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

No language can be more pertinent than that used by

a distinguished judge of this Court in a very early case when he sat upon the bench of a State Court:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies, would be governed by one law; the most of the community and those who made the law, by another; whereas, a like and general law, affecting the wholé community equally, could not have been passed. The idea of a people through their representatives making laws, whereby are swept away the life, liberty and property of one of a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name."

Catron, J. in Wally vs. Kennedy, (2 Yerg., 555,) and Vanzant vs. Waddell, (2 Yerg., 270-271.)

Or, as said by this Court in case of Barbier vs. Connoly, 113 U. S., 27:

"These provisions are undoubted intendedly that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcemont of contracts; that no impediment should be interposed to the pursuits of any

one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

We conclude this branch of the argument in support of the proposition made, by saying that this legislation does not come within any of the exceptions recognized by the judicial decisions of America. We do not mean to be understood as asserting that the State of Texas does not have power to subscribe regulations to promote the health, peace, morals, education and good order of its people and legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation, sometimes of a special character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary for general benefits, such as for supplying water, preventing fires, lighting districts, clearing streets, opening parks, and many other objects. As said by the Courts, occasions for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote with as little inconvenience as possible the general good. Though in many respects necessarily special in their character, these, in proper limitations, do not furnish just grounds of complaint, if they operate alike upon all persons and property, under the same circumstances and conditions. This Court will readily understand this distinction without further argument, as they readily understand, and have so often laid down explicitly, that no State can, under the guise of its police power, contravene an express provision of

the Federal Constitution. The argument of appellant, devoted as it is upon this head, in great measure, in the attempt to maintain the doctrine that the State of Texas has the right under its police power to exact this legislation, hardly needs an answer. If the legislation in question, contravenes the equality clause of the Fourteenth Amendment, the police power of the State must give way and subordinate itself to the mandate of the organic law. That this legislation does contravene the Fourteenth Amendment, is apparent upon its reading. All property in the State is entitled to equal protection and no species of property ought to receive any special favors. The earnings of the mechanic, or of the professional man, are entitled to the same protection as the earnings of the farmer or the stock raiser; and discrimination may be as potent against the citizen in the direction ot his property as if aimed directly against himself personally. The right to hold, enjoy or sell property upon equal terms with his neighbor and to make agreements and contracts concerning it which may be believed by the owner to be for his betterment equally with such right enjoyed by his neighbor, constitute the most essential rights of American citizens. With some citizens these rights are taken away by this statute. With others they are encouraged.

The argument of appellant's counsel that the discrimination is not arbitrary or capricious because the farmers and stockholders of Texas could not combine anyway, is hardly worthy of answer in this Court, and instead of tending to obviate the constitutional objection, really tends in an opposite direction. The question is not what the farmers and stock raisers of Texas may be able to do under the privileges accorded them by this statute, but the sole question under the proposition is: "Does the statute deny to any citizen of Texas the equal protection of its laws?" If it does, it is void, and the argument *ab inconvenienti* falls to the ground.

We submit in conclusion upon this proposition that the statute does discriminate between citizens; that it does deny to certain citizens and classes of citizens the equal protection of the laws; and that the lower Court did not err in so holding.

III.

Said Act of March 30, 1889, is further violative of the Federal Constitution, in that it deprives certain citizens and classes of liberty and property without due process of law. It deprives certain citizens of the liberty of contract and prevents the enforcement of lawful contracts made; and it takes from the citizen his rights of property without due condemnation according to the course of the law of the land.

AUTHORITIES.

Slaughter House Cases, 16 Wall., 36.
" " " , 1 Abb. (U. S.,) 399.
Bertholf vs O'Reilly, 74 N. Y., 515.
People vs. Marx, 99 N. Y., 377.
People vs. Gillson, 109 N. Y., 389.
R'y Co. vs. Jacksonville, 67 Ill., 37.
Hey Sing Iech vs. Anderson, 57 Cal., 251.
Lakeview vs. Cemetery Co., 70 Ill., 192.
Match Co. vs Roeber, 106 N. Y., 473.
Chemical Co. vs. Chemical Co., 64 Fed. R., 946.
Tiedeman Police Power, pp. 223 and 224.

Section 11 of said Act reads as follows:

"That any contract or agreement in violation of the provisions of this Act shall be absolutely void and not enforceable either in law or equity."

One of the most sacred rights of liberty is the right of contract, and all rights of contract which are necessary for the carrying on of business affairs, are protected by

the Constitution, and are incapable of restraint by legislative action. This right of contract embraces the formation of business relations between citizens, and any citizen may form business relations with whom he pleases, and in the conduct of such business they have an inalienable right to fix and limit the character and amount of business they propose to transact, to select parties with whom they propose to deal, and to fix the prices at which they intend to buy or sell. As said by Tiedeman in his work on limitations of the police power:

"It is part of the national and civil liberty, to form business relations free from the dictation of the State; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contracts which constitute the base of the business relation or transaction. It is therefore the general rule that a man is free to ask for his wares, or his services, whatever price he is able to get, and others are willing to pay." (p. 233.) * * * "A man has a constitutional right to buy anything in any quantity, provided he uses only fair means, and sets his own price on it, or refuses to sell it at all. And what one man may lawfully do as an individual, two or more may also do when combined as partners. Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is, therefore, impossible to prohibit all combination. The prohibition must rest upon the objectionable character of the object of the combination. If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The constitutional privileges which protect the citizen in his liberty and property, entitle him to raise, produce, or manufacture; to increase or reduce the amount of his products; to fix and limit the prices at which he will buy and sell; to bargain with others as to prices; and to enter into all contracts usual and necessary in the ordinary avocations of production and trade. Government cannot limit these natural privileges, and any law which undertakes to abolish these rights, the exercise of which does not involve infringement upon the rights of others, or to limit their exercise in legitimate callings, is not within the police power. The Legislature cannot under pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning the health, safety, or welfare of society, and the Courts may examine into and annul such legislation. (67 Ill., 37; 57 Cal., 251.) If the prosecution of a particular calling or occupation threatens damage to the public or to individuals, it is a legitimate subject for public regulation, to the extent of preventing the evil; but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation. (70 Ill., 192.) It is likewise a judicial question whether the particular police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public. The State certainly has the power to prescribe regulations deemed promotive of the health, peace, morals, education and good order of its people, and to so legislate as to increase industries, develop resources, and add to the general wealth and prosperity. Sometimes legislation of this character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary to be imposed for general benefits, such as supplying water, preventing fires, lighting districts, cleaning and grading streets, opening parks and many other like objects. Occasions

for these purposes may press with more or less weight upon one than upon another, but their design is not to impose unequal and unnecessary restriction upon any one, but to promote the general good with as little inconvenience as possible. Though in many respects special and discriminative in their character, under proper limitations, they do not furnish just ground of complaint, if they operate alike upon all persons and property under similar circumstances and conditions. The State in the exercise of its police power, may sometimes exempt certain classes from the operation of a general law, but the case at bar furnishes the only instance within the knowledge of counsel for appellee, in which the State has attempted to confirm, by general law, certain privileges to favored avocations, and has denied the other classes a right to exercise such privileges. It is the first recorded instance of legislation, in which the State has said to two or three classes: "Go, combine with the world if you desire, raise prices by such combination to any figure; the higher the better; rob the customer *ad libitum* in the absolute necessities of human existence, and the greater the robbery, the better for the people. I will be a guide and a shield to you by day and by night;" and in the same breath, the State has decreed that if any one, outside the few favored classes, shall dare exercise their rights of contract with reference to property, which adheres to them as a part and parcel of their natural liberty, just as it does with the select classes, they shall be *anathema*.

These legislative acts are not addressed to the suppression of unreasonable and oppressive combination, but to any kind, reasonable or unreasonable; and such is their interpretation by the Supreme Court of Texas. They embrace combinations between two or more persons, and hence include common partnerships. They denounce alike combinations between small capital and

a minimum of skill, equally with large capital and a maximum of skill. It is made criminal for any two persons to combine as partners, corporations or otherwise, in ordinary business, to increase or reduce the price of their commodities; to fix a standard of prices; to limit or reduce the production of commodities; to limit competition between them; to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between themselves, or between themselves and others; and to create and carry out any restrictions in trade. If marriage may be considered a business venture, as it undoubtedly is by gradual development, then is matrimony made criminal by these acts, for it certainly prevents competition between the contracting parties, even if it does not limit production. One of its objects is to reduce or increase prices and to fix standards. A and B agree to combine their capital, skill and acts in an ordinary business co-partnership for the purpose of manufacturing and dealing in certain articles. They must necessarily determine, in advance, the extent of production, and the prices at which they propose to sell, and thus fix a standard of prices, below which they agree not to sell. This is a crime under this act. They fix a figure on which they commence sales, and agree to graduate prices according to the cost of production. This is likewise a crime. In the vicissitude of trade they are compelled to lower prices in order to meet competition. This is also a crime. The cost of production may advance, to meet which, they agree to advance prices. This is a felony. Stock accumulates and trade languishes, and in order to do any business they agree to reduce prices. Again they are denounced as felons by these acts. And yet the right to combine, to form partnerships and joint stock associations, and to agree as to production and prices, is not oppressive to the public nor unjust to the individual, nor contrary to

public policy. It is an essential right, as part of the liberty of the citizen, of which no Legislature can deprive him; and that an ordinary business co-partnership is rendered criminal by this act, is apparent from the concluding portion of section 1, which forbids any two or more persons from combining together their capital, skill or acts, for the purpose of keeping any commodity at a fixed or graded figure, or by which they shall agree to unite any interest they may have in the sale or transportation of any article or commodity so that its price might, in any manner, be affected. (Sec. 1, § 5.) The same inhibition applies to members of a corporation, for such membership certainly excludes all idea of competition between individuals composing the body corporate; and yet the laws of Texas authorize the formation of corporations for numerous business purposes. Can it be that the same statute book contains a law imposing the penalty of felony upon all individuals who may enter into such associations? Corporations constitute the basis of our present economic civilization, and so permeate and control the business world, as to make their present existence an absolute necessity to mankind. Any interference with their lawful operations, by way of prohibition, infringes at once upon the liberty of the citizens, who, under legal sanction, have a right to deal with and through such agencies, and by lawful methods have made them the chief hand-maiden of an ever advancing and developing civilization. If they do wrong, they ought to be punished, but Texas ought not, at least, by a single enactment, to abolish them from the face of the earth. Restrictions in trade are not always hurtful, and competition is not always a public benefaction. Excessive competition almost invariably results in actual injury to the public. The right to combine for ordinary business purposes, and as a consequence, to fix prices and charge them according to varying conditions, and to limit or increase produc-

tion according to business exigencies, constitute, in great, part the liberty of the citizen, and legislation treads upon dangerous ground when it attempts to limit or abridge the right of private contract. Such legislation, to be valid, must always carry with it the essentiul sanction of reasonableness, and if it oversteps this established bonndary, it comes in immediate conflict with the liberty of the citizen, and sooner or later disappears from the statute book as an utterly worthless thing. This Texas act reaches the acme of absurdity by making penal any agreement for the purpose of reducing prices to the public; and all the regulations attempted are not only unreasonable in their scope and purpose, but utterly subversive of fundamental principles, and collide in their absolute recklessness with the Constitutions of both Nation and State. They should be weighed in the balances and found wanting. The property rights of citizens, not only of Texas, but of other States and of the United States, are involved in this issue. Many of them have made lawful and reasonable business contracts, upon the faith of which they have expended large sums of money, relying upon that protection in such ventures that the law always affords. To their surprise, the unreasonable provisions of this legislation have been applied to their ventures in trade, and their property has been taken from them, under section eleven of these acts, by a refusal of the Courts to enforce their contracts. They have dealt with their property as they saw citizens of Texas dealing with their property, and naturally supposed that they were living under a government of equal laws, and that they could not be deprived of their property except by due course of the law of the land. They have discovered, however, that the arbitrary provisions of these statutes, and the unconstitutional regulations enacted, are applied to them, and that their contracts have been held "absolutely void and not enforceable either in law

or equity." The Court is asked to right these wrongs and to again vindicate the liberty of the citizen from arbitrary spoliation, and to measure the same justice to an outsider that this ill considered and unconstitutional enactment guarantees to the farmers and stock raisers of Texas.

IV.

Said Act of March 30, 1894, is further violative of the Federal Constitution in that it provides that every foreign corporation (meaning thereby any corporation not incorporated by the State of Texas) violating any of the provisions of said act should be denied the right and prohibited from doing any business within the State of Texas, and it should be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings of the District Court of Travis County, in the name of the State of Texas. This provision permeates the whole statute, and being inseparable, render such statute wholly void under the Constitution.

AUTHORITIES.

Postal Telegraph Company vs. Adams, 155 U. S., 696.
Allegeyer vs. Louisiana, 165 U. S., 578.
Leisy vs. Hardin, 135 U. S., 100.
Kidd vs. Pearson, 128 U. S., 120.
Ex-Parte Asher, 128 U. S., 189.
G., C. & S. F. R'y vs. Hefley, 158 U. S., 98.
LeLoup vs. Mobile, 127 U. S., 640.
Morgan vs. Louisiana, 118 U. S., 455.
Walling vs. Michigan, 116 U. S., 446.
Mobile vs. Kimball, 102 U. S., 691.
Railway vs. Husen, 95 U. S., 465.
Henderson vs. The Mayor, etc., 92 U. S., 257.
Gibbons vs. Ogden., 9 Wheat, 195-6.
W. U. Tel. Co. vs. State, 62 Tex., 630.

Ex-Parte Towles, et al., 48 Tex., 413.
Turner vs. Eddy and Cross, 83 Tex., 218.
Dodson vs. Bunton, 81 Tex., 655.
Read vs. Levy, 30 Tex., 738.
Am. & Eng. Ency. of Law, Vol. 23, p. 225, paragraph 2.
People vs. Porter, 90 N. Y., 68.
Bittle vs. Stuart, 34 Ark., 224.
Jones vs. Jones, 104 N. Y., 234.
Black vs. Trover, 79 B. A., 123.
Dells vs. Kennedy, 49 Wis., 555.
Lathrop vs. Mills, 19 Cal., 514.
Kelley vs. State, 6 Ohio St., 269.
Black on Interpretation of Laws, p. 96 and cases cited, viz:
Warren vs. Mayer, 2 Gray, 84.
Campau vs. Detroit, 14 Mich., 276.
State vs. Dousman, 28 Wis., 541.
Slauson vs. Racine, 13 Wis., 398.
Elkhart vs. State, 5 W. Va., 515.
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Brooks vs. Hydorn, 76 Mich., 273.
42 N. Y. Rep., 1122.
Ex-Parte Jones, 49 Ark., 110.
Woodsworth vs. R'y Co., 18 Colo., 600.
Black on Constitutional Law, 62 and cases cited, viz:
Hinze vs. People, 92 Ill., 406.
Ex-Parte Frazer, 54 Cal., 94.
State vs. Tuttle, 53 Wis., 45.
State vs. Ernicious, 33 La. Ann., 253.
People vs. Cooper, 83 Ill., 585.
Ex-Parte Towles, 48 Tex., 413.
Santo vs. State, 2 Clark (Iowa), 165.
3 Am. & Eng. Ency. of Law, 676 et seq.
11 Am. & Eng. Ency. of Law, 368 and notes.

It is elementary that Courts are not authorized to add to or take from a statute. They can construe a statute and interpret its language so as to arrive at the legislative intent, but they cannot abolish words and phrases in a statute and say that the Legislature never really meant what it actually said. This would be an invasion of legislative prerogative, leading inevitably to judicial tyranny and arbitrary government.

Now the intent of the Legislature as manifested in Section 4, of this act, is too plain for construction. It was dealing with a subject deemed of paramount interest to the people, and the intention was to provide a prompt and drastic public remedy against any foreign corporation which should transcend the provisions of law designed to protect the people from the rapacity of trusts; and if any member of the Legislature thought of the Constitution of the United States in the passage of this act, he was wilfully ignorant or carelessly indifferent to its provisions. They were after trusts, and took no thought of hesitancy in the pursuit, or paused to weigh the safeguard thrown around State legislation by the founders of the Republic. The particular section is as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act, is hereby denied the right, and prohibited from doing any business within, this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis County, in the name of the State of Texas."

Could language be more explicit? "Prohibited from doing any business within this State." Certainly this comprehends every character and class of business, including inter-state commerce. It is no answer to say that the Legislature intended only to prevent the offend-

ing corporation from doing any local business in Texas. The Legislature did not say this, but the contrary. It said that the offending corporation should not do any business in Texas, meaning thereby local or otherwise; and the duty is imposed upon the Attorney-General of the State to enforce that provision by injunction. How could the Attorney-General enforce it by injunction except by a prayer that the offending corporation should be prohibited and restrained from doing any business in Texas? Could the Attorney-General come into a Court under this section and ask the Court to enjoin the offending corporation from doing some business in Texas, to-wit: local business? Where would be his authority for such action? It would be an abandonment of the law as laid down by the legislative department of the State, and directly contrary to the terms of the statute. This being the case the infirmity of the statute cannot be relieved by construction. Its vice cannot be eliminated by holding that the Legislature did not intend to say what they actually did say and that they intended only in the enactment of the act to prohibit the foreign corporation offending against the law from doing any local business in Texas. This, we submit, would not cure the infirmity, but would render the statute ridiculous and all attempts to enforce it futile.

That this character of legislation conflicts directly with the powers of the general government under the Constitution needs neither argument nor authority. This Court has decided in a large number of cases that no State can place a restriction in any form upon inter-state commerce, either upon the commerce itself, the business of doing inter-state commerce, or the instruments and means employed to carry out such commerce. (Postal Telegraph Co. vs. Adams, 155 U. S., 688.) The right of a State to tax the franchise or privilege of a corporation has been repeatedly recognized by this Court,

and, this, whether the corporation be a domestic or a foreign corporation doing business by its permission within the State. But this Court has been equally explicit to lay down the rule that a State cannot exclude from its limits a corporation engaged in inter-state or foreign commerce or a corporation doing business with the general government, either directly in terms, or indirectly by the imposition of inadmissible conditions. (155 U. S., 696.)

In Leisy vs. Hardin, (135 U. S., 100,) which was a case involving the question of inter-state commerce directly, this Court laid down a similar doctrine, and also carefully defined the limit of the State authority touching inter-state commerce, and the powers of the general government with reference thereto. So, also, in the numerous cases cited under the proposition, this Court has taken occasion to define and limit the extent of the police power of a State, holding in every instance that this power, while it might be exercised in certain matters, could not be used by the State to affect in any manner inter-state or foreign commerce, but that under the Constitution all such powers were vested exclusively in the general government. Even as far back as Railroad Company vs. Husen, (95 U. S., 465,) this Court held that neither the unlimited power of a State to tax, nor any of its large police powers could be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress.

We deem it unnecessary to review or to set forth the decisions of this Court upon the subject, as the principle has been so clearly and so firmly established by repeated decisions that it would be but a waste of time to discuss them here.

We have here then an instance of a State attempting by legislation to interfere with the powers of the general government in matters of inter-state commerce; and yet

we are gravely assured by counsel for appellant that there can be no constitutional objection to the statute. If Texas can exclude from her limits any corporation engaged in inter-state commerce, whom she may select as a victim, then the work of the fathers in 1787 has been in vain. The very grievance which gave rise to a convention, was the hostile action of some of the States with reference to commerce coming into their limits from other States, and without which grievance possibly we would have never had an organized and effective general government. And yet, notwithstanding the provisions of the Constitution, and its repeated exposition by this Court, the State of Texas has gravely attempted to say that whenever in her judgment some foreign corporation engaged in inter-state commerce was not doing exactly according to her liking, she would arrogate to herself the right to exclude such corporation from her limits and prohibit it from doing any business therein, either local or inter-state. This is the declaration of her statute, and this declaration we call to the attention of the Court.

If there could be any doubt as to the meaning of this Section 4, it is altogether relieved by the provisions of Section 9, of the same act, which reads as follows:

"Section 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

Here we have also the assertion of the right on the part of the State of Texas to reach out and punish citizens of the Unined States, who never set foot upon Texas soil, and never had a transaction involving a

nickel in the State, but who upon some suspicion of an imaginary connection with a trust, formed outside of the State, Texas proposes to drag within her limits and punish him. The indictment in this case, which is set forth in the record in full, shows that the very conspiracy of which Texas proposes to take jurisdiction was a conspiracy organized in the State of New York. The indictment further shows that this conspiracy was organized for the purposes of dealing in inter-state commerce and, therefore, subject to the exclusive jurisdiction conferred upon Congress by the Constitution, and put into effective operation by the conspiracy Act of 1890. What has Texas to do with a Conspiracy organized in New York City with reference to inter-state commerce? Grant that the allegations of the indictment are true, which may be admitted simply for the sake of argument, what jurisdiction can Texas exercise over a conspiracy organized beyond her borders? The crime of conspiracy is complete without any overt act. Certainly if the alleged combination in the State of New York was not a crime against the laws of New York, Texas might well afford to let the affairs of New York alone. And if such organization or agreement was a crime against the laws of the United States, it occurs to us that the United States is competent to handle her affairs, criminal and otherwise, without the aid of any particular State, even so great a State as Texas. The power claimed and asserted in this act, if a valid exercise of constitutional power, would enable Texas to reach out her arm and crush many of the industries of other States in the American Union; to destroy property of citizens of other States; to deny rights guaranteed by the Federal Constitution to the citizens of all the States, and in effect to overturn and destroy one of the most important powers granted to the Federal Government, and without the grant of which the Union would never have existed. No exigency can excuse the attempted

usurpation of such powers. No cause can exist, no matter how potent it may occur to the legislative mind in Texas, which can authorize the State to thus override the fundamental guarantees of the Constitution of the United States. And it would comport better with the dignity of the State to preserve, protect and defend its legitimate powers under the Constitution, rather than indulge in a vain attempt to usurp other powers not legitimately belonging to it in an effort to hide behind the police power of the State.

We submit, therefore, that this proposition is clearly established by the decisions of this Court, and that Sections 4 and 9 of the act are violative of the Federal Constitution, and serve to illustrate in a manner most efficacious, the unlawful intent manifested in the statute.

We cannot conclude this argument and brief without a reference to that portion of appellant's brief which may be found on pages 65 and 66. It is a matter of regret to counsel for appellee that the distinguished counsel for appellant should endeavor in this high Court to lug into the case, as a part of his argument, some imaginary occurrence which took place in the trial of a case before the State Court at Austin, Texas, six months after this record was made up. What purpose counsel expected to subserve by these statements cannot very well be understood by counsel for appellee. These are matters *dehors* the record and have no place in this argument. This Court is not dealing with the Waters-Pierce Oil Company, nor with the Standard Oil Trust, nor with the people of Texas, nor with the State Government of Texas, nor with the Courts of Texas; it is dealing with the constitutional rights of an American citizen, and what might have taken place in the trial of some case at Austin in the summer of 1897, is totally irrelevant, if not impertinent. Counsel for appellee could very well

decline to make any reply whatever to this portion of appellant's brief. But they will take occasion here to say in direct contradiction to the statements of said brief, that it was not proven in that case that the Waters-Pierce Oil Company had entered into an agreement with various oil companies which compose the Standard Oil Trust, and that no other company in what was known as the Standard Oil Trust compete with the Waters-Pierce Oil Company in Texas in the sale of illuminating oils, nor was that fact admitted on the trial. To the contrary, it was directly proven that no such agreement had been made between the Waters-Pierce Oil Company and the Standard Oil Trust. It was also proven that the Standard Oil Trust had dissolved in 1892 and did not have a present existence. So cogent and convincing was the proof that the trial judge instructed the jury in his charge to disregard all evidence touching any agreement or combination between the Waters-Pierce Oil Company and the Standard Oil Trust, because the State of Texas had failed utterly in its evidence to establish any such combination. But, as said before, this has nothing to do with this case here, and counsel for appellee feel that they owe this Court an apology for even adverting to it.

We submit the case, and ask the Court for an affirmance of the judgment of the Circuit Court of the United States, discharging the appellee for the reasons stated in the opinion of that Court.

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No. 336.

Brief of Choate & Dodd for Appellee.

Filed Jan. 20, 1898.

Supreme Court of the United States,

October Term, 1897, No. 336.

JOHN W. BAKER, SHERIFF OF MCLENNAN COUNTY, TEXAS,
Appellant,

vs.

WM. GRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

ARGUMENT FOR APPELLEE.

BY JOS. H. CHOATE AND S. C. T. DODD,
Of Counsel.

EVENING POST JOB PRINTING HOUSE, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 336.

JOHN W. BAKER, Sheriff of McLennan County, Texas,
Appellant,

vs.

WM. GRICE.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Argument for Appellee

By JOS. H. CHOATE and S. C. T. DODD, *of Counsel.*

We shall endeaver in this argument to show that the Act of March 30, 1889, of the State of Texas, makes penal all association of persons for business purposes, and renders it impossible for persons thus associated to carry on business, and that the right of persons to associate and carry on business is one of the liberties protected by the XIVth Amendment of the Federal Constitution.

We shall touch very briefly upon other unconstitutional features of this act and upon other questions arising in this case, for the reason that they will be argued fully by the able counsel with whom

we are associated, whose distance of residence prevents our joining in or pre-examining each others printed arguments, and renders probable some repetition, which will be avoided as far as possible.

The first section of the act reads as follows:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade; second, to limit or reduce the production, or increase or reduce the price of merchandise, or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State; fifth, to make or enter into, or carry out or execute any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation between them or themselves and others, to preclude a free and unrestricted competition, among themselves or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

I.—The act makes criminal all association for business purposes.

We first call attention to the definition of a trust contained in this act.

"A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes."

COMBINATION.—The word "combination" embraces every form of association and every contract by which men unite in business. The words "capital, skill or acts," also embrace every method by which men may associate for business purposes. It has been claimed that only two methods of association are known to the law, the partnership and the corporation. Certain special characteristics of these two conjoined make the joint stock association. Each or all of these methods of association are combinations of capital, skill or acts of two or more persons.

Parsons on Partnership (3d Ed., p. 6), thus defines a partnership:

"The combination by two or more persons, of capital, labor or skill, for the purpose of business for their own benefit."

In 3 Kent's Commentaries (p. 23), partnership is defined as:

"A contract of two or more competent persons to place their money, effects, labor or skill, or some or all of these in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions."

In 1 Lindley on Partnership (4th Ed. p., 3), will be found a number of definitions, all agreeing that

partnership is a joinder by persons of capital, skill or acts in business, with a sharing of the common profits.

The combinations of capital, skill or acts by two or more persons, which the act condemns, includes all partnerships, corporations and associations, having in view either, any or all of certain enumerated purposes.

In order to demonstrate that the act makes criminal all association for business purposes, it is only necessary to show that one or more of the enumerated purposes is essential to every business association, whether partnership, corporation or Joint Stock Association, being so necessary a factor of the combination that the existence of the one implies the existence of the other.

PURPOSE.—This renders it necessary to consider what the law regards as a "purpose." A purpose is a mental state, an intent, a design. Every man is *prima facie* supposed to intend every necessary, or even probable or natural consequence of his own act.

"If there be infraction of the law the intention to break the law must be inferred. * * * A man must be taken to have had the intention implied from the act."

Broome's Legal Maxims, 7th Ed., p. 307.

If, for illustration, the effect of every combination is necessarily and naturally to prevent competition, the law must infer that such was the purpose of the combination, and it matters not whether this was the main purpose, a subsidiary purpose, or only a necessary consequence. As is well said in Bishop on Criminal Law, Sec. 337:

"In the affairs of life it is seldom a man does any one thing, prompted by one motive alone, to accomplish one end." * * * "Suppose, then, a

man has several intents and in pursuance of them together moving him does what the law forbids. The rule here is, that, if there are the intents necessary to constitute the offense, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone. Thus under the English statute against demolishing houses, if one object of a mob attacking a house is to injure a person in it; yet if another, and even inferior object is to demolish the house, the offense is committed in consequence of this inferior intent."

Hence, if the main purpose of a partnership is to carry on a business, yet if the combination of persons as partners necessarily and naturally prevents competition between them, or violates any other of the provisions of the act, that also, in contemplation of law, is a purpose of the combination.

The purpose must in any case be established by the effect. The act itself uses the word "purposes" and "effects" in the same sense. Section 7 provides that "in any indictment for an offense named in this act it is sufficient to state the *purposes* or *effects* of the trust or combination." The fifth clause of Section I. specifies one of the criminal purposes as follows: "to make and enter into, or carry out, or execute any contract"; and then follows a specification of numerous contracts which are made criminal. It is evident, then, that under this act a contract at any time entered into by a combination is to be considered one of the purposes of the combination. The mere entering into a contract by two or more persons forms a combination (for a contract is a combination), and the fact that they have made and carried out the contract is all the evidence of purpose required. *It is manifest, then, that what is made criminal by the act is the doing by two or more persons of the matters specified as purposes, and the entering into and carrying out of any of the contracts, obligations or agreements specified in clause fifth of section first.*

RESTRICTIONS IN TRADE.—The first crime specified in the act is creating or carrying out restrictions in trade.

On this we shall not dwell at this time, because "restriction of competition," hereafter to be considered, embraces all restriction of trade—and a great deal in addition. All contracts in restraint of trade are also in restriction of competition. But many contracts in restriction of competition are not contracts in restraint of trade.

We desire, at this place, to call attention to the rule of construction established in the case of the United States *vs.* The Trans-Missouri Freight Association, 166 U. S., 290.

Mr. Justice PECKHAM says, p. 327:

"It is now, with much amplification of argument, urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

"The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which, in fact, restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade

and still be valid at common law. Although valid, it is, nevertheless, a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term contract in restraint of trade, all contracts of that nature, whether valid or otherwise, would be included and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade, or commerce, among the several States, &c., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restrainst of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The courts both of England and America have held that many contracts in restraint of trade are reasonable, are not prejudicial to the public interest, are beneficial to the parties entering into them, and are a necessity of trade. It would be idle to cite the numerous authorities establishing these principles. We most earnestly contend that under Article XIV. of the Federal Constitution, *no State can deprive persons of their liberty of entering into contracts which are reasonable, which are not contrary to public policy, which are beneficial to the contracting parties, and a necessity of trade.* The reasons in support of this contention will appear in that portion of the argument which we now approach.

CLAUSES WHICH DEPRIVE PERSONS OF LIBERTY OF ASSOCIATION.—We now take the liberty of grouping together the prohibitions of Section First of the act which we contend absolutely deprive persons of the liberty of association in business.

I.—Creating or carrying out restrictions in trade.

II.—Preventing competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities.

III.—To make or enter into, or carry out, or execute, any contract, obligation or agreement of any kind or description by which two or more persons shall in any manner preclude a free and unrestricted competition among themselves or others in the sale or purchase of any such article or commodity.

IV.—Or by which they shall agree to pool, acquire or unite any interest that they may have in connection with the sale or transportation of any such article or commodity, that its price may in any manner be affected.

PREVENTION OF COMPETITION.—The rule of construction adopted by this Court in the Trans-Missouri Freight Association case must be applied to the statute now under consideration. When the Legislature makes criminal every association of two or more persons which precludes a free and unrestricted competition between themselves or others, it means just what the language says.

It does not mean unreasonable prevention of competition. The word "unreasonable" cannot be read into the act. It does not mean prevention of competition in general, or over the State, or over the world. It means prevention of competition on a small scale as well as on a large scale, including prevention of competition between two persons, no matter how small their trade, nor how narrow the territory affected.

The Legislature precludes all possible doubt of its meaning when it follows the general prohibition of all combinations preventing competition, by making criminal contracts between two or more persons by which they shall in any manner preclude free and unrestricted competition among themselves, or by

which they shall unite any interest they may have in connection with the sale or transportation of any article, that its price might in any manner be affected.

PARTNERSHIPS PREVENT COMPETITION.—What is competition? It is the act of striving to gain what another is striving to gain at the same time. It is rivalry in the pursuit of the same object. In business, persons who are striving to secure the same customers for the same class of goods are competitors, and the means used to secure customers is competition.

If they enter into any alliance by which they cease to be rivals, they are no longer competitors. If two who are in competition agree among themselves not to sell to the customers of the other they have restricted competition between themselves. So, also, if they agree as to the prices at which they will sell. But, more effective than all, if persons agree to unite their capital, skill or acts in cooperation in the same object and to divide the profits received, they thereby absolutely preclude competition between themselves. Instead of being rivals they become associates. Instead of each striving to obtain his ends at the expense of the other, they work in harmony for an end which will mutually benefit them. In fact, association is the antithesis of competition and all association of persons in business, whether as partners or corporators, prevents competition.

It is usual in articles of copartnership to stipulate that each partner shall devote his time and attention to the business of the firm, and shall not engage in any business in competition with the firm. This is an agreement to prevent competition, but even if no such agreement is entered into between the partners, the law implies it. "The first and highest duty which partners owe each other is that of perfect good faith. A partner must do what he can to promote the prosperity of the firm." * * * "It is quite well settled that a partner has no right to carry

away his knowledge, his skill, his capital or his credit, his care or labor into another business, whether only his own, or that of another firm, to the injury of his first copartners. That is, he may not do this in such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him" (*Parsons on Part.*, 4th Ed., Sec. 153).

Undoubtedly the circumstances might be such, or the copartnership agreement such, that individuals composing the firm could legally compete with the firm, but such a case is barely conjectural. It is unusual and contrary to the true intent and purpose of a copartnership, which is co-operation and not competition.

Partnership not only prevents competition between the persons associated, but restricts competition generally. That is, it leaves fewer persons to compete, and it gives the persons combined an advantage over individuals. There is no need to argue in relation to the advantages and power of association in business. It is so marked that the business of the world is carried on by its means. It is so great, that many fear the abuse of the power, and would revert to the days of individual industry before machinery made association a necessity. It is this fear that gave rise to the law now being considered, and we are certainly in correspondence with the minds of the makers of this law when we admit that combination destroys competition between the persons combined, and restrains competition in general. The Legislators in the State of Texas did their work effectually. Believing that where "combination is possible, competition is impossible," they have utterly destroyed the power of combination. The generalization contained in the popular saying is entirely too broad, and the Legislature arguing from a false premise struck too deep and have deprived citizens of a liberty without which modern business is impossible.

There is no possible escape from the obvious and self-evident proposition that any association in business prevents competition among the persons associated, and that if prevention of competition is made criminal, association is made impossible. Prevention of competition is a purpose or effect of every copartnership, joint-stock association or corporation. It is a purpose or effect of every contract, agreement or understanding by which men associate or cooperate.

Prevent men from making contracts which preclude a free and unrestricted competition among themselves, and we are at once relegated to the savage state. If association or cooperation is forbidden, unrestricted and unrelieved warfare becomes an enforced method in business.

PREVENTION OF COMPETITION NOT CONTRARY TO PUBLIC POLICY NOR VOID AT COMMON LAW.—It now becomes necessary to meet an argument, which may be stated briefly as follows: that agreements which prevent competition are contrary to public policy and void at common law; that copartnerships were never void at common law, therefore copartnerships do not prevent competition.

The fallacy of this self-contradictory proposition is in the first premise. All agreements which prevent competition were never void at common law, being in that respect like contracts in restraint of trade, only some of which were void. And the best evidence that all agreements that prevent competition were not void is the undisputed fact that copartnerships were always upheld by law and that corporations always existed.

But this point upon which misapprehension exists to such an extent as to lead even careful judges to a misuse of language, seems to require further elaboration, although words seem powerless to make much clearer the simple proposition that copartnerships do prevent competition, and that all contracts

in prevention of competition were never void at common law.

DIFFERENCE BETWEEN DICTA OF JUDGES AND STATUTE LAW.—It is admitted that cases can be cited in which Judges, delivering opinions, have said that whatever restricts competition, or has a tendency thereto, is void. But there is a vast difference between the effect of language in a judicial opinion and the same language in a statute. The language of the one must be interpreted in its application to the facts in a particular case, while the language of the other must be interpreted according to the literal meaning of the words. Hence the common law is fluid and adaptable to circumstances, while statute law is solid and not capable of adaptation. When a court condemns restrictions of competition we study the facts of the case to learn the character of the restrictions condemned; when a statute condemns restrictions of competition it does so without qualification, without exception, without regard to circumstances, and without consideration of the reasonableness or unreasonableness of the restrictions.

HISTORY OF LAWS AGAINST COMBINATION.—Going back to the beginnings of our common law, we will find that all laws against combination because restrictive of competition were statutory, and a brief reference to these statute laws and the reason and spirit of them will serve to show that the right to form associations is a part of that liberty which cannot be safely yielded into the hands of any legislative body.

At the foundation of all the statutes against trade combinations lays the idea that prices could be regulated by law. In a brief review in the second chapter of Thorold Rogers on "The Economical Interpretation of History" it is said that laws fixing prices on wheat and beer are so old that they are undated. An example of early statutes is 37

Edw. III., which fixes the prices of poultry, regulates the diet and apparel of servants, ordains that handicraftsmen shall use but one mystery, and is also the first statute against engrossing to enhance prices.

By very early statutes local authorities were empowered to fix prices on almost all products. Many statutes were enacted regulating prices of meat and clothing. Early attention was paid to the rate of wages, because prices were supposed to be dependent upon wages. The first of the infamous Statutes of Laborers was 23 Edw. III., A. D. 1349. This punished employees for taking wages higher than those fixed by law, and employers for paying them. It also attempted to compel the sale of all manner of victual at reasonable prices. It was but natural that workmen should combine against such laws, and consequently in a new Statute of Laborers, 34 Edw. III., A. D. 1360, we find the first statute against association, in the provision that alliances, covines, congregations, chapters, ordinances and oaths made, or to be made, by masons or carpenters should be void and annulled. This provision is contained in a statute which prescribed that fugitive laborers should be branded with the letter F. The Statute of Laborers was amended and reenacted in various reigns with divers provisions against confederacies of workingmen. 3 Hen. VI., C. 1, was an act against confederacies and yearly congregations of masons in general chapters, and 15 Hen. VI., C. 6, prohibited guilds of laborers and artificers. From 23 Edw. I. to James I., thirty-seven acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C. 4. This system of infamous laws which enslaved the laborer were not finally swept from the Statute Book until 1825.

During the same periods numerous other statutes were passed fixing prices upon products, endeavoring to prevent enhancement of prices, and in some cases to prevent lowering of prices. They are too

numerous for enumeration. They will be found in "Pickering's Statutes," and many of them are referred to and quoted in an able and interesting work just published by Albert Stickney, of the New York bar, entitled "State Control of Trade and Commerce." The best known of the statutes of this character is 5 and 6 Edw. VI., C. 14, relative to forestalling, regrating and engrossing, which act created a variety of offences, even punishing such persons as were guilty of "making any motion by word, letter, message or otherwise for the enhancing of the price or dearer selling of anything or things above mentioned," and also those who got "into his or their hands by buying, contracting, or promise-taking to the intent to sell again." In relation to all of these acts, it may be said they prevented dealings by wholesale, and are utterly incompatible with modern business. They were all, some thirty-six in number, swept away by the statute 7 and 8 Vict., C. 24, with the confession that they created the evils they sought to alleviate.

The offenses of the character above enumerated, created by statutes, became known as "offenses against trade." The persons who, through a union of capital, skill or acts, produced any of the prohibited results became guilty of a conspiracy against trade. In the Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6, it is stated that the crime of conspiracy is statutory, and not of common law, and that the different statutory laws relative to conspiracy were enacted in aid of statutes such as enumerated, as, for instances, the various Statutes of Laborers, the Statute of 27 Edw. III., A. D. 1353, making it a felony for merchants to make "conspiracy, confederacy, covine, imagination, evil device or murmur," for the disturbance of the staples and of the price of wool, and many similar. Whether this be correct, or whether the crime of conspiracy ante-dated the statutes, it is evident that conspiracy against trade

once embraced scores of statutory offenses not now deemed illegal.

THE RIGHT TO FORM PARTNERSHIPS ALWAYS EXISTED.—And here is a point which cannot be too strongly impressed upon the judicial mind, that amid all this madness of legislation, and during the centuries when a mistaken belief prevailed that any alliances, covines or associations of persons engaged in business had the tendency to injuriously affect prices and interfere with trade, the right to form partnerships in business existed and was recognized as a common-law right. This is evident from the fact that no case has been found in which the right has been questioned. It is evident also from the few statutes by which the right was limited. Of these we have discovered only two, but it is probable there were others. The statute, 28 Geo. III., C. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale. The statute, 17 Geo. III., C. 42, prevented combinations by copartnership, or otherwise, in the purchase or sale of bricks.

Copartnerships were therefore recognized as combinations which prevented competition and effected prices. How could it be otherwise? And yet in spite of a frenzy in relation to combinations to effect prices which Adam Smith compared to the witchcraft craze, the partnership remained unmolested. For this no other reason can be given than that the right to form partnerships was a portion of that liberty which was secured by Magna Charta, of which no freeman might be deprived. "*Nullus liber homo, &c.*" These words, says Parker, *C. J.*, in *Mitchel* vs. *Reynolds*, 1 Smith's L. C., 511, "have been always taken to extend to freedom of trade." Therefore Parliament, in its omnipotence, respected the right, and even judges affected by the prevailing craze, permitted it to exist unchallenged.

The laws relative to partnership existed, as Lord Coke said, "per legem mercatoriam," which, as hath

been said, is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*." And so the right of association in business continued as one of the sacred liberties of free citizens almost untouched through all those centuries in which, as Buckle says, "every European government, which legislated respecting trade, acted as if its main object was to suppress the trade and ruin the traders. Laws to regulate wages, laws to regulate prices, laws to regulate profits; interference with markets, interference with manufactories, interference with machinery, interference even with shops."

CORPORATIONS.—The long continued battle against corporations, while partnerships went unscathed, shows that it was not combinations *per se*, but peculiar methods of combination which excited legal animadversions. Corporations could only be created by king's patent, or act of Parliament, consequently there was no need of anti-corporation laws.

Most corporations were, in fact, monopolies by virtue of their charter, but corporations as such were denounced as tending to obstruct the free use of labor, as limiting competition, as putting down individual industry, and affording facilities for combinations among tradesmen for defrauding the public. The subject is discussed by Adam Smith and other political economists. But corporations vindicated their right to exist, notwithstanding these fears.

JOINT STOCK ASSOCIATIONS.—One form of partnership was condemned by law in a manner which suggests the statute under consideration; namely, a partnership with transferable shares, or a joint-stock association. The statute, 6 Geo. I., C. 18, declared associations for commercial undertakings with transferable shares to be a common nuisance, and inflicted the penalty of imprisonment for life and confiscation of goods. Even this severity of punish-

ment has been imitated in the Texas act as will hereafter be seen. This statute which is known in history as the "Infamous Bubble Act" was during its existence a dead letter, and was long ago repealed.

Joint stock associations existed in spite of it, otherwise England's rapidly developing industries could never have been carried on. Few persons were convicted under it and none were punished. The law was simply futile, says Lindley in his work on Partnership, p. 6. In fact, it is doubtful if these old statutes relative to combinations to enhance prices were ever enforced. An investigation confirms what is said by Stickney in the work above cited: "The reports of cases in the English courts show an almost entire absence of even so much as an attempt to enforce these old statutes. In time, by common consent, the statutes making such combinations criminal became obsolete. It was found by experience that they could not be enforced, and that their mere existence, with occasional sporadic attempts at enforcement, did more harm than good." The cases arising under the Bubble Act seem to be the first in which it was urged that whatever interfered with competition is contrary to law.

CASES UNDER THE BUBBLE ACT.—In *R.* vs. *Webb*, 14 East, 406, and *Pratt* vs. *Hutchinson*, 15 East, 511, it was strongly urged that the grouping together of numbers of persons, with transferable shares, for the purpose of carrying on trade, was calculated to put down individual industry and competition. It was said "if fifty persons may do this, why may not a thousand?" This argument of danger in numbers applies to an ordinary partnership as strongly as to a joint stock association. It did not prevail with the court in those cases. It is true that Lord Eldon was of the opinion that companies with large capitals, and with transferable shares, were injurious to the public and illegal, independent of the act referred to (1 Lindley on Part., 193), but this opin-

ion did not prevail, and such associations after some fluctuations of opinion were finally held to be legal unless affirmatively shown to be of a dangerous or mischievous character. 1 Lindley on Part., 194.

Thus it is evident that while the statutory law and the dicta of judges in some cases went to absurd lengths against certain forms of association, the right of association, notwithstanding the recognized and established fact that it limits competition, was never denied, and has existed under the protection of law from the days of the adoption of the law merchant until the present time. Never, either by common law nor by statute law, were all agreements in restriction of competition illegal. Such agreements were among the most ordinary and necessary in commercial life, and the right to enter into them was one of the most cherished liberties of the citizen.

The court, by Bowen, *J.*, in Mogul S. S. Co. *vs.* McGregor, 23 Q. B. D., 598, stated a principle which was always a principle of the common law, as follows: "The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse for the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—

would be only another method of attempting to set boundaries to the tides."

This case is authority, if authority could be needed, for the proposition that combinations which restricted competition, and which prevented competition between the persons combined, never were illegal by the common law of England. This conclusion cannot be doubted when it is remembered that the statute laws of England never went to the length of preventing all association.

REVIEW OF AMERICAN CASES.--We now desire to review briefly the American cases in regard to restrictions of competition.

It will not be questioned that the right of persons to associate themselves and their capital and skill, has existed in this country from the earliest colonial times and has been exercised to a greater extent than in any other country. All the important business of the land is conducted through firms, associations and corporations. If there are cases which decide combinations in restriction of competition to be illegal, they are in direct variance with the industrial history of the country and with the statutes of all our States which authorize the creation of partnerships and corporations. But, an examination of the cases will show that it is not association *per se*, but only certain particular associations which have been condemned. The language of judges may have been broader than this, but such language must be qualified in its application to the particular facts of the cases.

The first American case in which an opinion was enunciated, which, carried to its full extent, would be fatal to association, was *Hooker* vs. *Vandewater*, 4 Denio, 349.

The court, JEWETT, *J.*, says: "It is a familiar maxim that competition is the life of trade; it follows that whatever destroys or even relaxes competition in trade, is injurious, if not fatal to it."

This is the first case in which we find this language used. The familiar maxim is ancient enough, but the conclusion that "whatever relaxes competition in trade is injurious, if not fatal, to it" seems to have been an original deduction of the judge in the case, and can hardly be accepted as conclusive either in law or economics.

The citation of authority for this language is *People* vs. *Fisher*, 14 Wend., 9. *People* vs. *Fisher* was an indictment for a conspiracy of shoe-makers to raise wages by striking, and was sustainable, if at all, on the ground that the workmen used illegal means to accomplish a legal purpose. It did not use, and was never authority for the language quoted. *Hooker* vs. *Vandewater* was the case of a pooling agreement between several individuals and firms, the proprietors of five several lines of boats on the Erie and Oswego Canals. They did not unite their capital, skill or acts. They were competitors and pooled their profits solely for the purpose of controlling or raising prices, which were to be established by agreement of all the parties interested. The language of the court must be interpreted in its application to the case, and, being so interpreted, means only that pooling agreements between competitors for the purpose of controlling prices, are contrary to public policy. This is very distinct from a combination of persons, capital, skill or acts in one firm or corporation by means of which parties cease to be competitors, and work with a joint interest.

The case of *Stanton* vs. *Allen*, 5 Denio, 434, was likewise a pooling agreement among the proprietors of boats on the Erie and Oswego Canals, by which they regulated the price of freight and passage by a uniform scale, and divided the profits according to the number of boats employed by each.

There was no common ownership of the capital employed, there was no union of persons, skill or acts. Firms which were separate remained separate and each continued to carry on its own business

separately. If the statute condemned only such agreements, not a word would be said against its constitutionality.

An early and important case, which clearly notes a diversity between combinations which destroy competition, is *Com.* vs. *Carlisle*, Brightly (Pa.), 36. That noted jurist, Judge Gibson, says: "If a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competition with others of the same calling. An association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large, and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for the purposes of commerce or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs which stimulates to competition and enables men to engage in undertakings too weighty for an individual" (p. 40).

In the case of *Central Ohio Salt Co.* vs. *Guthrie*, 35 Ohio St., 666, thirty or more persons, firms or corporations who were and continued to be engaged separately in the manufacture of salt entered into a pooling agreement for the sole purpose of regulating prices, and for that end placed the business of receiving and distributing the salt manufactured by the different concerns under the control of five persons, to be chosen annually.

The language used by the court in regard to the restriction of competition must be interpreted with reference to the nature of the agreement, which was

a pooling agreement between competitors, and not a union of capital, skill or acts in a partnership.

The same is true of

Emery *vs.* The Ohio Candle Co., 47 Ohio St., 320;
Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Pa. St., 173;
India Bagging Association *vs.* Koch & Co., 14 La. Ann., 168;
U. S. *vs.* Jellico Coal Co., 46 Fed. Rep., 432;
Lumber Co. *vs.* Hayes, 76 Cal., 387;
Craft *vs.* McConoughy, 79 Ill., 346;
Gibbs *vs.* Gas Co., 130 U. S., 396,

and many others. All were cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and pooling of their receipts. As was said by SANBORN, *J.*, in U. S. *vs.* Trans-Missouri Freight Association, 58 Fed. Rep., 58: "In none of these cases were they (the courts) required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

The learned counsel for appellant argues that it was not the intention of the Legislature to prevent partnerships and corporations, but only to prevent agreements similar to those condemned by the foregoing cases. To this we answer that in none of the foregoing cases was there a joinder of capital, skill or acts, but only an agreement in relation to production and prices between competitive firms and corporations. If that is all the Legislature intended to prevent, it has used language not only wide of the mark, but expressive, as nearly as possible, of that which was contrary to its intent. This court can only judge the intent from the language used, and will not permit the Legislature to set a net large enough to catch the innocent as well as the

guilty. A criminal statute should be plain and men should not be forced to carry on ordinary business under the shadow of felony. Neither can the plain language of the statute be escaped by the fact that the Legislature at the same session recognized and authorized the existence of partnerships and corporations. Acts are often inconsistent, and it may well be that the Legislature did not comprehend the full force and effect of the language used. If the statute, construed by its plain terms, leads to absurd and unforeseen consequences, so much the greater reason that coming under the ban of unconstitutionality it ceases to work mischief. The quoted opinion of Justice Denman, so far from being a construction of the act, is but a repetition of its language, to wit, that a trust is a combination of capital, skill or acts by two or more, and the union of capital, skill or acts denounced "is where the parties in the particular case designed the united co-operation of such agencies (to wit, persons, as well as firms and corporations), which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." And this, as we have shown, is just what takes place when persons who might have been otherwise independent and competing, enter into partnership.

It is easy to refer to a current of cases to show that a multitude of contracts and combinations which restrict competition are legal, not taking into consideration the ordinary commercial partnership, which has never been questioned in any court, nor joint-stock associations nor corporations, which are authorized by statute in every State. It is not necessary to cite the cases which hold contracts in reasonable restriction of trade to be legal, although all such contracts are in restriction of competition. The leading case of *Mitchel* vs. *Reynolds*, 1 P. Wms., 181, held that a contract which clearly restricted competition was not illegal. A multitude of other cases will be found collected in the U. S. *vs.* Trans-Missouri Freight Association, 58 Fed. Rep., 71 and 72.

In *Marsh* vs. *Russell*, 66 N. Y., 288, a distinction between legal and illegal contracts in restriction of trade was clearly set forth as follows: "When a lawful business is carried on by a firm its members can regulate the prices at which they will buy and sell." * * * "Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their article of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price, nor sold for less than a certain price? Such an agreement would certainly not upon its face be unlawful."

Parties associated for a reasonable and honest purpose may agree not to compete. *Phippen* vs. *Stickney*, 3 Met., 384.

Two firms were competitors in the business of transportation. As such they could not enter into an agreement not to compete or to fix prices. But they agreed to organize a corporation to conduct the business theretofore conducted by the competing firms. Held to be legal. *Lorillard* vs. *Clyde*, 86 N. Y., 384.

The *Central Shade Roller Co.* vs. *Cushman*, 143 Mass., 353, holds that competitors may agree to form a corporation for the purpose of preventing competition.

In *Craft* vs. *McConoughy*, 79 Ill., 346, the court points out that "a partnership had not been formed for the purpose of trading in grain, but only a secret combination to enable the parties, by secret and fraudulent means, to control the prices of grain."

In *Diamond Match Co.* vs. *Roeber*, 106 N. Y., 473, the court says: "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the purpose of preventing competition, and the validity

of the contract, if supported by a consideration, will turn upon its reasonableness as between the parties."

"Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil." *Leslie* vs. *Lorillard*, 110 N. Y., 519-534.

In *Matthews* vs. *Associated Press*, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving, or publishing, the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The court held that the by-law was reasonable and valid. It said, "the greater the number belonging to the organization, the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. *To suppress competition in such chosen field among themselves* and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other" (p. 341).

"Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality."

Jones. vs. *Fell*, 5 Fla., 510, 515.

"As a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads and cross mountains and deserts with them; they erect churches, colleges, lyceums and theatres; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing that is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations."

Judge Field in Railroad Tax Cases, 13 Fed. Rep., 743.

The foregoing citation of authorities is solely for the purpose of showing that which does not seem to be in need of proof, to wit, that associations restrictive of competition were not void at common law, but that on the contrary combinations restrictive of competition have always been upheld by law, and the right to combine is to be classed among the most important and least questioned liberties of the citizens. An act which makes criminal combination which prevents competition and also contracts which preclude free and unrestricted competition between the persons contracting as well as between themselves and others, absolutely prevents all associations for business purposes, including partnerships, corporations and joint-stock associations. It prevents also

a variety of other contracts such as, for instance, contracts between employer and employee, organizations of mechanics engaged in the same line of business for the purpose of maintaining wages; the appointment by two producers of the same person to sell their goods on commission; the sale of the good-will of a business with an agreement not to destroy its value by engaging in a similar business, and others of like nature.

II.—Provisions of the act which make business by associations and also by individuals impossible.

The purposes and agreements not heretofore alluded to, enumerated by the first section of the act, are as follows:

1. Those limiting or reducing the production of commodities.
2. Those increasing the price of commodities.
3. Those reducing the price of commodities.
4. Those fixing the price of commodities at any standard, or figure, whereby their price to the public shall be in any manner controlled or established.
5. Agreements not to sell or dispose of, or transport any article below a standard figure.
6. Agreements to keep the price of such articles at a fixed or graduated figure.
7. Agreements by which persons establish or settle the price of any article between themselves.
8. Agreements by which persons unite any interest in connection with any sale or transportation of any article that its price might in any manner be affected.

It is apparent by a glance at this list of prohibitions, that the act in addition to rendering association impossible also renders impossible the carrying on of business by persons associated. Associates may not limit or reduce the production of commodities in which they deal under any circumstances. They cannot have any understanding or agreement whatever in relation to the prices of commodities in which they deal. They cannot increase their prices nor reduce their prices, nor fix them at any standard, nor agree not to sell below a certain figure, nor establish or settle the price of any article between themselves. In fact they can neither agree that the prices shall remain fixed nor can they alter them. To sum up the whole matter in the language of the act, they cannot unite any interest in relation to any article which will in any manner affect its price.

But this act does more than to prevent association, and to render business by persons associated impossible, it makes business by joint tenants, copartners and joint owners impossible, and makes criminal the ordinary transaction of bargain and sale.

Joint-ownership, or ownership in common, is distinct from partnership, yet it constitutes a combination of capital. If persons are tenants in common of a farm they are owners in common of its produce. Such owners could not agree to limit or reduce their production. They could neither agree to keep their price at a fixed figure, nor agree to increase, or reduce, their prices. They could not settle the price as between themselves nor agree on anything that affected the prices to the public.

The process of buying and selling is the fixing of a price at which one is willing to part with and another to accept commodities. The contract of bargain or sale is rendered impossible if two persons cannot in any manner establish or settle the price of any article between themselves.

Or take the case suggested by the court below. A. & B. each own half a carload of potatoes and agree to ship together in order to obtain carload

rates, thus enabling them to sell lower in the markets. This is uniting their interest in such a manner as to affect the prices and is forbidden by the act.

III.—The act makes criminal combination of persons, capital, skill or acts for the purpose of reducing prices.

Multitudes of absurd consequences flow from this act, on which it is unnecessary to dwell, but one more must be mentioned because it is one which must excite astonishment in the minds of economists, legislators and men of business. *The act makes criminal association of persons, skill or acts, for the purpose of reducing prices.*

This provision of the law needs no comment. The bare statement of it is sufficient. The fact that it is a provision of a law which this court is asked to sustain, gives rise to many reflections, and will be commented upon by future historians when they attempt to account for a state of feeling existing in some portions of this country to-day, but which it is hoped will prove evanescent.

The act which fixed a penalty of life imprisonment and confiscation of goods upon the issuing of transferable shares by a partnership is known in history as "infamous."

It is hard to say, when the industrial history of this age shall be written, what term will be found severe enough to characterize this act with its accumulative penalties, amounting to life imprisonment and confiscation of property, in cases of persons who have for a month or more united their capital, skill and acts in such a manner as to reduce the price of commodities.

We do not deem it necessary to dwell upon this portion of the act, since it has been so clearly characterized by the court below. For convenience of

reference we reproduce here the language of Mr. Justice Swayne to which we refer (71 Fed. Rep., 642):

"We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the cost of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price, up or down, as the cost of production may vary. Finding after a time their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

"If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves, or thembelves and others, and bind themselves to sell their commodities at a figure, or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices, and increasing

and diminishing their productions, at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purposes is not of the slightest consequence."

"The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices; it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The Legislature perhaps had in mind that which might possibly be a means of public oppression, to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not so discriminate, because of the want of ordinary care in studying the meanings of words, that we have on the statute books of Texas at this close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalled in the world's history, an act making it a highly penal offence for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell."

IV.—Authorities on the unconstitutionality of the first section of the act.

It only remains to show by citation of authorities that the Constitution protects liberty of contract, except in so far as that liberty encroaches upon the liberty of others; that among the rights of contract thus protected is the right of men to associate together in the conduct of business, and to unite their capital, skill or acts therein; including also the right, while thus associated, to agree upon the amount of their production, and the prices at which they will buy and sell, which necessarily embraces also the right to raise and lower the prices of the commodities in which they deal, and to keep them at a fixed price.

In Allgeyer *vs.* Louisiana, 165 U.S., 578, the court, through Mr. Justice PECKHAM, says, p. 589:

"The liberty mentioned in that (XIV.) amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Again the learned Justice says:

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property, must be embraced the right to make all proper contracts in relation thereto."

It was said by Mr. Justice BRADLEY in the *Butcher's Union Co.* vs. *Crescent City Co.*, 111

U. S., 746-762, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, the learned Justice says: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." The following New York cases are important on this point:

Bertholf *vs.* O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People *vs.* Marx, 99 N. Y., 377.
People *vs.* Gillson, 109 N. Y., 389.
Forster *vs.* Scott, 136 N. Y., 577.

In the Gilson case Mr. Justice PECKHAM, referring to the former cases, said (p. 398):

"The following propositions are firmly established and recognized; a person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn

his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

There is no liberty more sacredly guarded than the right of contract. The language of *Printing Co.* vs. *Sampson*, 19 Eq. Cases, 462, has been adopted by several American courts.

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

And in the *U. S. Chemical Co.* vs. *Provident Chemical Co.*, 64 Fed. Rep., 946, the Court says:

"The right to contract is a cardinal element of constitutional liberty, and as such should be jealously guarded."

The courts of many States of the Union have guarded this right of contract by declaring unconstitutional acts which infringed upon it. In Pennsylvania the statute forbidding manufacturers from paying wages in orders was held unconstitutional, as being an attempt to prevent persons *sui juris* from making their own contracts (*Godcharles* vs. *Wigeman*, 113 Pa. St., 431). The U. S. Circuit Court in Ohio declared unconstitutional a statute preventing railroad companies from contracting with employees in respect of personal injuries (*Shaver* vs. *Pa. Co.*, 71 Fed. Rep., 931). The Ohio Supreme Court held an act relating to mechanics' liens void because it interfered with the right of contract (*Palmer* vs. *Tingle*, 45 N. E. Rep., 313). In Illinois the Truck-store act, the coal-weighing act and other legislation has been set aside for the same reason.

Frorer *vs.* People, 141 Ill., 171.
Ramsey *vs.* People, 142 Ill., 380.
Harding *vs.* People, 160 Ill., 459.
Richie *vs.* People, 152 Ill., 98.

Legislation has been pronounced unconstitutional in other States on the same ground.

Kuhn *vs.* Detroit, 70 Mich., 534.
Spry Lumber Co. *vs.* Trust Co., 77 Mich., 199.
State *vs.* Loomis, 115 Mo., 307.
State *vs.* Julow, 129 Mo., 163.
State *vs.* Goodwill, 33 W. Va., 179.
Ex parte Kuback, 85 Cal., 274.
Low *vs.* Rees' Printing Co., 41 Neb., 127.
In re Eight Hour Law, 21 Col., 29.
Com. *vs.* Perry, 155 Mass., 117.

Among the rights of contract thus protected is the right of men to form business relations among themselves.

Judge Cooley says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice" (Cooley on Torts, 278). The reverse must be equally true. A man may form business relations with whom he pleases, and in the conduct of such relations the persons thus associated may fix or limit the character and amount of their business or production, and the prices they will charge for the products which they manufacture, in which they deal or about which they contract.

In past ages the government exercised an almost unlimited power to control prices of commodities and labor, but, says Tiedeman, "Under a constitutional popular government there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that the like freedom should be secured and enjoyed in determining the condition and terms of the contract which constitutes the basis of the business relation or transaction. It is

therefore the general rule that man is free to ask for his ware or his services whatever price he is able to get and others are willing to pay" (Tiedeman's Limitations of Police Power," 233).

What one man may do individually, two or more may do when lawfully associated in business relations.

It is not denied that the Legislature, in the exercise of police power, may infringe upon the liberty of the citizen and restrict even the right of contract; but as said by Tiedeman, Limitations of Police Power, Section 1, "any law which undertakes to abolish rights, the exercise of which does not involve an infringement on the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government."

Again, on page 197, he says:

"It is also a judicial question whether the police regulations extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The Legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil."

All these views are well supported by authority. We need cite but few of the many cases which hold that the Legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning health, safety or the welfare of

society, and the courts may examine into and annul such illegal legislation.

T. W. & W. R. Co. *vs.* Jacksonville, 67 Ill., 37.
Coe *vs.* Shultz, 47 Barb., 64.
Quintini *vs.* City of Bay St. Louis, 1 South. R., 625.
Town of Lake View *vs.* Rose Hill Co., 70 Ill., 191.
Thorpe *vs.* R. R. Co., 27 Vt., 140.
Lowry *vs.* Rainwater, 70 Mo., 152.
Jeck *vs.* Anderson, 57 Cal., 251.

In People *vs* Gillson, 109 N. Y., 389, 400, Mr. Justice PECKHAM said: "This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described nor its extent plainly limited further, at least, than this; it is not above the Constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re* Jacobs (98 N. Y., 107), the question was examined and most exhaustively reviewed by Earl, *J.*, in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the Legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of this State; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

In Colon *vs.* Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the

general rules laid down by the above authorities. The court said, "equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People *vs.* Marx, 99 N. Y., 377, 387). Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods (People *vs.* Arensberg, 103 N. Y., 399). This power can be exercised only to promote the public good, and is always subject to judicial scrutiny (Forster *vs.* Scott, 136 N. Y., 577, 584). Whenever the legislature passes an act which transcends the limits of the police power it is the duty of the judiciary to pronounce it invalid and to nullify the legislative attempt to invade the citizens' rights (People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529, 535). That power must be exercised subject to the provisions of both the Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department *vs.* Rector, 145 N. Y., 32, 39)."

Police Power and Public Policy.—The question whether the Legislature has passed the limit of its police power in enacting the law in question, may be tested by the well-known legal principle of "public policy." Public policy is a branch of police power, applied by the courts, whereby individuals are prevented from doing that which is injurious to the public, or against the public good. Individuals are forced to yield portions of their natural rights,

when the exercise of the serights interferes with the good of the public. It is sometimes said that the Legislature creates public policy. By this is meant only that the court cannot declare that to be contrary to public policy which the Legislature has legalized.

But the Legislature cannot create "public policy" in destruction of constitutional rights, nor in restriction of individual liberty, unless, in judicial opinion, such restriction is necessary for the public welfare. The validity of such laws always depends upon the question whether the enacted restrictions are demanded by public policy. We have already shown that no court has ever held it to be contrary to public policy for persons to combine their capital, skill or acts with the purpose of, or (what is the same thing) with the effect of, preventing competition. No court has ever held it to be contrary to public policy for persons to enter into agreements which preclude free and unrestricted competition among themselves. No court has ever held it to be contrary to public policy for persons to unite capital, skill and acts, for the purpose of reducing the price of commodities. No court has ever held contrary to public policy any union of interest which in any manner affects prices. No court has ever held it to be contrary to public policy for persons united in business, whether as partners or corporators, to agree among themselves as to their production, or prices, or to alter them as they may be able, or the necessities of trade may demand. On the contrary, from the days of Magna Charta, these things have been in accordance with public policy. The right to associate has been unquestioned. The right to unite capital, skill or acts has, from the earliest dawn of civilization, been free. Industry has not been carried on by unassociated individuals. Association has ever been a business necessity. Without it machinery could not have been utilized, manufactories could not have been created, commodities could not have been transported. Rail-

roads, telegraphs, steamships, mines, factories are rendered possible only by combination of capital, skill and acts, for the express purposes prohibited by the Texas act, and particularly for the purpose, and, as history proves, with the inevitable effect, of *reducing* the prices of commodities. The question of a return to individual industry involves a choice between civilization and barbarism, a choice between industry as now carried on in our commercial centres and as carried on in some of the rural and mountainous portions of our country, where as yet no combination of capital, skill or acts has taken place.

V.—The act violates the liberties of citizens of foreign States.

In enacting this law the State of Texas not only violated the liberties of its own citizens, which are protected by the Federal Constitution, it violated also the liberties of the citizens of other States.

Section 4 of the act reads as follows: "Every foreign corporation, violating any provision of this act, is hereby denied the right, and prohibited from doing any business within the State."

IT INTERFERES WITH INTERSTATE COMMERCE.—If our view of the construction of this act is correct, the mere formation of a corporation violates the act, because every corporation restricts competition. Hence the act effectually excludes all corporations of other States from doing any business whatever in Texas. Admitting that the State can prevent the formation of domestic corporations and exclude foreign corporations from its borders, this limitation must be noted, that the State has no power to exclude corporations of other States engaged in interstate commerce.

In *Crutcher* vs. *Kentucky*, 141 U. S., 47, Mr. Justice BRADLEY said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State, it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

The authorities upon this point are numerous, and the question is no longer a disputable one.

Norfolk R. R. Co. *vs.* Pennsylvania, 136 U. S., 114.
McCall *vs.* California, 136 U. S., 104.
Pembina Co. *vs.* Pennsylvania, 125 U. S., 181.
Horn Silver Mining Co. *vs.* New York 143 U. S., 305.
Robbins *vs.* Shelby Taxing Dist., 120 U. S , 489.
Telegraph Co. *vs.* Texas, 105 U. S., 460.
Glouscester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.

The attorney for appellant, in asserting that the opinion of the state court that this statute does not undertake to regulate interstate commerce is binding upon this tribunal, mistakes opinion for construction. To decide whether the act interferes with interstate commerce requires more than a construction of the statute. It requires also a construction of the Federal Constitution, a definition of interstate commerce, and a judgment as to what does and does not interfere with it. These are questions for this court in relation to which it cannot be governed by the judgment of state tribunals.

We do not dwell upon this feature, however, because the act goes so much further than the mere attempt to exclude foreign corporations. No partnership or association can carry on business of any nature in the State of Texas, except under the shadow of criminal prosecution, and the act undertakes to punish citizens of other States, not resident in the State of Texas, for forming associations or entering into any of the contracts prohibited by the act, although such contracts are legal in the State in which they were made.

IT PUNISHES ACTS COMMITTED IN OTHER STATES.—Section 9 of the act is as follows:

"Persons out of the State may commit, or be liable to indictment and conviction for committing, any of the offenses enumerated in this act, which do not, in their commission, necessarily require a personal presence in this State, *the object being to reach and punish all persons offending against its provisions, whether within or without the State.*"

ITS PENALTIES.—Section 6 of the act further provides "that any violation of any or all the provisions of this act shall be and is hereby declared a conspiracy against trade," and any person taking part in any such conspiracy as principal, manager, director, agent, servant, employee or in any other capacity, "shall be punished by a fine of not less than $50 nor more than $5,000, and by imprisonment in the penitentiary not less than one, or more than ten years, or by either such fine or imprisonment. Each day during the violation of this provision shall constitute a separate offense."

Section 10 provides a further cumulative penalty of $50 per day.

By virtue of these sections, if persons who have united their capital, skill or acts in a partnership or corporation in the State of New York, send any of their commodities into the State of Texas, and have

in that State agents, servants or employees, all of the persons thus associated, and all the agents, servants or employees, are conspirators. Each day that they conduct this business constitutes a separate offense and makes them liable to the cumulative penalties. Under this act, in the case of indictment against Grice and others, the State asserted the right to issue requisitions to bring into the State for trial, persons connected with corporations in the States of Missouri and New York who had never set foot in the State of Texas. The result of thus forcing them to indictment and trial in the State of Texas can be appreciated when it is seen that the mere forming of association and reduction of prices, insures conviction, and that the possible penalty, if business is carried on in Texas by a foreign corporation for one year, is $5,000 × 365 = $1,875,000 fine, and $50 × 365 = $18,250 forfeiture to the State, and 365 × 10 = 3,650 years imprisonment.

Conviction, too, can take place under the act without proper indictment or evidence. The 7th and 8th sections read as follows:

"7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with, or in pursuance of it, without giving its name or description, or how, when or where it was created.

"8. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonged to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such."

Furthermore, by another law of the State of Texas, persons convicted of a felony are not relieved of imprisonment pending an appeal, so that conviction under this act insures imprisonment until an appeal drags its slow length through the State, and possibly through the United States courts. It will therefore be seen that the struggle in this case is not only for the liberty of a citizen of the State of Texas, but for the liberties of the citizens of other States whom the State of Texas claims the right to convict and punish for acts legal in the State where committed.

AUTHORITIES ON ENCROACHMENTS UPON STATE SOVEREIGNTY.--It is of the utmost importance to consider the right of a State to punish citizens of other States who offend against the provisions of its laws without being personally present in the State.

Even prior to the adoption of the XIV. Amendment, there could not have been any difficulty in regard to such usurpation of authority. It is a fundamental maxim that "no State or nation can by its laws directly affect or bind persons not resident there." * * * "It would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations that one nation should be at liberty to regulate either persons, or things, not within its own territory" (Story on Conflict of Laws, Sec. 20.) Between nations such conflicts of sovereignty can only be regulated by treaty, or arms, but our Federal Constitution has failed in its design of forming a "perfect union" if it has not provided for such encroachments upon State sovereignty.

In *McCulloch* vs. *Maryland*, 4 Wheaton, 316, Chief Justice MARSHALL demonstrated that no specific provision in the Constitution was needed to keep States within their proper jurisdiction. The State of Maryland attempted to tax the bank of the United States. It was held that from the very structure of the Government the power of the State

was confined to persons and matter within its sovereignty.

"In this," says the learned Chief Justice, "we have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one government to pull down what there is an acknowleged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve" (p. 430).

In *St. Louis* vs. *The Ferry Co.*, 11 Wall., 423, 430, Mr. Justice SWAYNE said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *The Railroad Co.* vs. *Jackson*, 7 Wall., 262, it was held that Pennsylvania could not tax property beyond her jurisdiction. Mr. Justice FIELD, referring to the last cited case in State Tax on Foreign Held Bonds, 15 Wall., 300, 319, says:

"The decision is nevertheless authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition."

If a State cannot interfere with property beyond its jurisdiction, still less can it interfere with the liberties of persons beyond its jurisdiction, and convict them of felony under its laws for acts com-

mitted in other States legal under the laws of the States where committed.

XIV. AMENDMENT PROTECTS ALL CITIZENS OF THE UNITED STATES AGAINST STATE USURPATION.—No specific provision in the Constitution is necessary to establish so plain a proposition, but if required it is found in the XIV. Amendment: "No State shall make or enforce any law which shall abridge any privileges or immunities of a citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This provision protects the rights of every citizen of the United State against usurpation of State authority (*Slaughter*s *House Cases*, 16 Wall., 36). And in Allgeyer *v.* Louisiana, 165 U. S., 579, it was held that for one State to make criminal an agreement entered into in another State is an attempt to deprive citizens of other States of their liberty without due process of law. Mr. Justice PECKHAM says, p. 591:

"When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State Legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to

enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

The counsel for appellant endeavors to justify this provision by reference to a narrow class of cases in which it has been held that if a person out of a state procures a crime to be committed in that state by an innocent agent, he may, if afterwards found in the state, be held as a principal, if a misdemeanor, or accessory, if a felony. Give to these cases all the latitude possible, this still must be kept in mind, that the person must be tried for the specific act he procured to be committed. The commission by an agent of one act cannot justify the punishment of the principal for another act committed in another state and legal there, yet this is what this act undertakes to do. "Any violation of any or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person taking part in such conspiracy as principal, manager, proprietor, agent, servant, employee,

or in any other capacity, shall be punished," * * * "whether within or without the state."

If A, B and C form a partnership in New York and send goods to Texas for sale they have done nothing illegal under the laws of New York or the Federal law. If their agent in Texas raises the prices of their goods, or reduces the prices or keeps them at a fixed price, he violates this law. Now, what does the State claim the right to do? Punish the New York parties as accessories to the felony of reducing prices or raising them as the case may be? By no means. It undertakes to punish them for a conspiracy against trade, and the conspiracy consists in the combination of capital, skill and acts which took place in New York by an agreement legal under the laws of that state.

IF PART UNCONSTITUTIONAL, THE ACT IS VOID.—The eminent Judge who tried this case in the court below, while holding this feature of the act clearly unconstitutional, was of the opinion that its unconstitutionality might not affect the remainder of the act. In this we think he erred. This is a penal act, and the rule that part of an act may fail and the remainder be valid has very strict limitations when applied to penal acts.

In *U. S.* vs. *Reese*, 92 U. S., 214–221, the court, by Chief Justice WAITE, says: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."

" It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the Legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must annul its encroachments upon the reserved power of the States and the people."

This case is quoted and followed in U. S. *vs.* Harris, 106 U. S., 629; Trade Mark Cases, 100 U. S., 82, and Baldwin *vs.* Franks, 120 U. S., 678.

But the court will not find it necessary to decide the effect of this one unconstitutional provision upon the entire act. It is so woven in warp and woof with unconstitutional provisions that nothing can be left of it but mere rags and tatters.

VI.—The act deprives citizens of the equal protection of the laws.

One other glaringly unconstitutional provision must be noticed. Having undertaken to punish persons who form associations which restrict competition, whether between themselves or themselves and others; having taken away the liberty of contract to such an extent as to render business by association impossible, and thrown the shadow of felony over the ordinary contract of bargain and sale; having inflicted the most severe punishment upon those who attempt by a union of capital,skill

or acts to decrease the price of commodities; having undertaken to punish even residents of other States for associations formed and legal contracts made in those States, the remarkable act concludes with the following section:

"Sec. 13. The provisions of this act shall not apply to agricultural products or live-stock, while in the hands of the producer or raiser."

The learned Judge in the court below found from the evidence before him that this provision exempted, on a rough estimate, four-fifths of the residents of Texas from the penalties of this act. The exemption cannot be justified upon the ground of classification, for there is here no reasonable classification.

The late case of *Gulf, Colorado & Santa Fe Co.* vs. *Ellis* (165 U. S., 150), renders it unnecessary to dwell upon former authorities. The State Court of Texas upheld on the grounds of classification the constitutionality of an act of the Legislature giving to persons successfully suing claims against railway companies for stock, killed or injured, the right to recover an attorney fee of ten dollars. It was held by this Court, reversing the Courts below, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is found upon some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Mr. Justice BREWER, delivering the opinion of the Court, says (p. 155):

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection.

While, as a general proposition, this is undeniably true (Hayes *v.* Missouri, 120 U. S., 68; Railroad Co. *v.* Mackey, 127 U. S., 205; Walston *v.* Nevin, 128 U. S., 578; Bell's Gap Railroad *v.* Penn., 134 U. S., 232; Pacific Express Co. *v.* Seibert, 142 U. S., 339; Giozza *v.* Tiernan, 148 U. S., 657; Columbia South. Ry. *v.* Wright, 151 U. S., 470; Marchant v. Penn. R. R., 153 U. S., 380; St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S., 1); yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, *J.*, in State *v.* Loomis, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, &c., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at

which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'

"In Vanzant *v.* Waddel, 2 Yerger, 260, 270, Catron, *J.* (afterwards Mr. Justice Catron of this Court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In Dibrell *v.* Morris' Heirs, Supreme Court of Tennessee, 15 S. W. Rep., 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.'

"In Beel's Gap Railroad *v.* Pennsylvania, 134 U. S., 232, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the Court, by Mr. Justice Bradley, saying, on page 237: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, es-

pecially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the base of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (p. 159).

The learned Justice then cites numerous decisions of State courts holding unconstitutional acts which violate the principle of equal protection, and adds:

"It must not be understood that by citing that we endorse all these decisions. Our purpose is rather to

show the extent to which the courts of the various States have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained" (p. 165).

And tested by these principles, the statute *now* in controversy cannot be sustained. If associations which restrict competition and increase or reduce prices, and if agreements between associates concerning production and prices are so contrary to public policy as to justify the severe penalties of the act, no valid reason can be given why farmers and stock raisers should be exempted from like penalties. The legislative reason for the exemption is obvious. It enables a large majority of the citizens of Texas, engaged in the most important industries of the State, to reap the benefit of a liberty which is denied to a minority of the citizens of that State, and likewise to the citizens of other states engaged in interstate commerce in the State of Texas. It is a scheme to maintain prices of the principal products of Texas and to prevent maintenance of prices of other products. By virtue of the law, while agriculturists and stock raisers in Texas can combine to increase the prices of their products, purchasers cannot combine to reduce prices of the same products. This accounts for the absurd provision of the law making criminal combination of capital, skill or acts for the purpose of reducing prices. The legislators

had in view the prices of agricultural products and stock in first hands, and did not see that they struck away the very foundation stone of business prosperity. Cotton planters can combine and agree not to sell their cotton below a certain price, but two persons cannot enter into partnership to buy and sell cotton and make any agreement whatever about the price, and if manufacturers of cotton by any combination of capital, skill or acts are enabled to reduce the price of the manufactured product, they are liable to occupy a felon's cell.

So far from the classification being reasonable, it is not classification in any sense of the word. The act does not exempt agriculturists and stock raisers as a class, but only while they deal in products of their own raising. It is a classification of products, not of persons, and of products only prior to sale. The moment these products enter into commerce the exemption ceases. It is a discrimination in favor of the producer of certain products against the purchaser and consumer. It is an attempt to strike down commerce and trade in order to aid a favored class. Why should it be legal for cotton planters to form associations and make contracts of a nature which would send cotton manufacturers to a felon's cell? Unless a reasonable answer can be given to this question the act cannot be sustained. The act clearly attempts to restrict certain persons from a liberty which the mass of the community which made the law is permitted to exercise. The illegality of the exemption is so clearly shown in the case cited, and has been so ably elucidated in the opinion of the Court below, that further argument seems unnecessary.

ONLY AVAILABLE REMEDY IS THE WRIT OF HABEAS CORPUS.—ITS ALLOWANCE DISCRETIONARY.—It must be aparent to the court that if this act deprives persons of their liberty without due process of law, the only available method of preventing such illegal deprivation of liberty is by means of this *habeas*

corpus proceeding. It is admitted that the general rule is that parties being prosecuted in State courts will not be released on writ of *habeas corpus*, but will be left to reach the Supreme Court of the United States by writ of error. But it is well settled by authority that the Federal Court has jurisdiction to issue the writ and to discharge the prisoner if he be held in custody in violation of the Constitution. The question with the court is not one of jurisdiction, but of discretion. Each case will be governed by its own facts.

Ex parte Royall, 117 U. S., 241.
In re Frederich, 149 U. S., 70.
Ex parte Neagle, 135 U. S., 1.
In re Wood, 140 U. S., 278.
New York *vs.* Eno, 155 U. S., 89.
In re Belt, 159 U. S., 95.
In re Swan, 150 U. S., 637.

In *ex parte* Royall, this Court, by Mr. Justice Harlan, says: "This Court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial, in the Court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether under all the circumstances then existing the accused, if convicted, shall be put to his writ of error from the highest Court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States" (p. 252).

The case of Whitten *vs.* Tomlinson, 160 U. S.,

243, affirms that the Court will not exercise its discretion except in "peculiar and urgent" cases.

The character of the facts which justify the exercise of such discretion, making the case "peculiar and urgent," is well set forth by BREWER, *J.*, in *ex parte* Kieffer, 40 Fed. Rep., 399, as quoted in the opinion of the Court below. The facts which appealed to the discretion of the Circuit Judge in this case are so succinctly set forth in this opinion that no restatement of them need be made. Is it not sufficient that the defendant must suffer imprisonment during the pendency of a writ of error? If this act is unconstitutional it should be so declared by the Court at this time. Otherwise the liberty of this defendant will not be protected, for defendant being the agent of a corporation, his indictment under this act means conviction, and conviction necessitates incarceration until this case can reach the courts of the United States on writ of error. Not only the liberty of this defendant, but the liberty of thousands of other citizens of the United States will fail to be protected unless the discretionary power exercised by the Circuit Court be sustained. If Governors of Texas can be found to issue requisitions for members of corporations who never set foot within the boundaries of the State, Governors of other States will be found to honor such requisitions, and compel such citizens to stand trial in the State of Texas and suffer incarceration in its prisons until their cases can be heard and determined by the slow proceedings of a writ of error. The State Court has had its opportunity to pronounce upon this law, and finds no fault in it. The only remedy is in the United States Courts. Shall it be exercised here and now in favor of personal liberty or shall this defendant be remitted to a Texas prison to wait until the same question reaches this Court by a different process? Discretion should be exercised in favor of personal liberty and not in favor of unconstitutional laws.

We commend the language of Mr. Justice Bradley in *ex parte* Siebold, 100 U. S., 311, 376.

"An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior Court affecting it is not deemed so conclusive but that, as we have seen, the question of the Court's authority to try and imprison the party may be reviewed on *habeas corpus* by a Superior Court or Judge having authority to award the writ."

Also the language of Brewer, *J.*, in *ex parte* Kieffer, 40 Fed. Rep., 401.

"The party has a right to a speedy inquiry and determination in the Federal Court as to whether such ordinances are in conflict with the Constitution of the United States. The public as well as the individual are interested in a speedy settlement of this matter."

Nos. 336, 337, 338, 339

Add'l Brief of Johnson, Cla
& Choate for

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 27, 1898.

Nos. 336—339.

JOHN W. BAKER, SHERIFF, &c.,

vs.

WILLIAM GRICE ET AL.

ADDITIONAL AUTHORITIES AND PROPOSITIONS ON BEHALF OF APPELLEES.

I.

The court *a quo* did not err in issuing the writ of *habeas corpus*, because, if for no other reason, the Texas statute in issue (act of 1889) manifestly included and was intended to include acts of interstate commerce, and the exercise by the State of extraterritorial jurisdiction, contrary to the plain meaning and intent of the United States Constitution, and the indictment in its main count (6th) plainly charges appellees with combining in the State of New York for the purpose of shipping and selling oils in

Texas without any qualification as to local traffic. The indictment therefore charges an offense against the Sherman act of 1890, over which State courts could not exercise jurisdiction, and the remedy of appellees, according to the rules laid down by this court, was exclusively in Federal tribunals. The 6th count is plainly recognized by the court of criminal appeals of Texas as the main count of the indictment.

In re Loney, 134 U. S., 372.
Ex parte Kieffer, 40 Fed. R., 400.
Texas act 1889, par. 4, section 1.
Texas act 1889, sections 4 and 9.
Indictment, Record, p. 13 *et seq.*
Whitten *vs.* Tomlinson, 160 U. S., 231.

In the case first cited (Loney case) this court held that where a person was arrested by State authority for alleged perjury committed in a contested congressional election, it was the duty of the Federal courts to discharge on *habeas corpus*, because such charge was within the exclusive jurisdiction of the courts of the United States, and to permit it to be prosecuted in the State courts would greatly impede and embarrass the administration of justice in a national tribunal.

This case is quoted with approval in Whitten *vs.* Tomlinson (160 U. S.), and has a direct bearing and applicability to the point here presented as to jurisdiction.

II.

Under the laws of Texas a defendant charged by indictment for felony must be surrendered to the custody of the sheriff when his trial begins, and so remain until the trial ends. In case of his conviction and appeal, he is required to remain in jail pending appeal, and is not allowed bail.

These provisions appeal most strongly to the discretion of a court in granting the writ, especially when taken in connection with the exclusive jurisdiction over interstate commerce as embodied in the first proposition herein.

Wilson, Cr. Laws Texas, Art. 876 (4th ed.).

Wilson, Cr. Laws Texas, Art. 635 (4th ed.).

III.

The offense charged against appellees in the indictment is a felony, notwithstanding only a pecuniary fine may be imposed upon conviction.

Campbell *vs.* State, 22 Tex. Ct. of App., 262, 270.

IV.

The Texas courts grant writs of *habeas corpus*, even though relator may be at large,

Ex parte Coupland, 26 Tex., 388;

or out on bond;

Ex parte Trader, 24 Tex. Ct. of App., 394;

and for the purpose of testing the constitutionality of a statute,

Ex parte Mato, 19 Ct. of App., 116;

or the validity of a "local option" election;

Ex parte Kramer, 19 Ct. of App., 125;

or the validity of a city ordinance;

Ex parte Gregory, 20 Ct. of App., 210;

and said courts expressly hold that *habeas corpus* is the proper remedy to force a speedy trial.

Rutherford *vs.* State, 16 Ct. of App., 651.

These courts also hold that when the return shows a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process.

Ex parte Schwartz, 2 Ct. of App., 79.

Respectfully submitted.

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BAKER *v.* GRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 336. Argued January 26, 1898. — Decided February 21, 1898.

While Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the statement of the case (below), to issue a writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction, by the discharge of a prisoner, unless in cases of peculiar urgency, but should leave the prisoner to be dealt with by the courts of the State; and even after a final determination of the case by those courts should ordinarily leave the prisoner to his remedy by writ of error from this court.

Upon the facts appearing in this case no sufficient case was made out for the exercise of the jurisdiction of the Circuit Court by the issue of a

Statement of the Case.

writ of *habeas corpus* to take the prisoner out of the custody of the state court.

It is the rule of courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court.

THIS appeal is from an order of the United States Circuit Court for the Northern District of Texas, made upon a return to a writ of *habeas corpus*, issued by that court to inquire into the cause for the detention of the petitioner, William Grice, who, it was alleged, was unlawfully restrained of his liberty by and held in the custody of J. W. Baker, the sheriff of McLennan County, Texas. After a hearing, the Circuit Court, on the 22d of February, 1897, discharged the petitioner. 79 Fed. Rep. 627.

The petition for the writ was filed on the 9th of December, 1896, and therein the petitioner, among other things, made the following allegations: That he was unlawfully restrained of his liberty by the sheriff of McLennan County, Texas, having been surrendered by his sureties under a recognizance which he had theretofore given; that he was detained by the sheriff under an indictment preferred against him and other citizens of the United States on the 21st of November, 1894. The indictment charged that William Grice, E. T. Hathaway and several others, named in the indictment, unlawfully combined and engaged among themselves and with others, who were unknown to the grand jury, in a conspiracy against trade, and that they had created a trust by a combination of their capital, skill and acts for the purpose of creating and carrying out restrictions in trade. The indictment was based upon an act passed by the legislature of Texas on the 30th of March, 1889, which is generally known and described as the anti-trust act of that State. When the indictment was presented, the defendants (including the petitioner herein) were arrested and brought before the proper court and entered into a recognizance conditioned for their appearance in court from day to day and term to term to answer the indictment. On the 2d of December, 1895, the case was regularly called, and the defendants, pursuant to the provisions of the code of crim-

inal procedure of the State of Texas, announced a severance, and thereupon E. T. Hathaway, one of the defendants named in the indictment, was placed on trial to answer the charges contained therein. Before proceeding to trial on the merits, he in effect demurred to the indictment on the ground, among others, that the above named act of the State of Texas was a violation of the Federal Constitution, for reasons which he stated. The demurrer was overruled and the trial of the cause was then proceeded with, and on the 12th of December, 1895, a verdict of guilty as charged in the indictment was rendered, and the jury assessed defendant's punishment at a fine of $50. Hathaway duly took proceedings for the purpose of obtaining a review by the Court of Criminal Appeals of the State of Texas of the various matters raised by the demurrer and in the course of his trial.

Under the law of Texas, one who is convicted of a felony, although the punishment imposed is only a fine, is still necessarily subjected to confinement in the jail pending the determination of any appeal which he may take, and under that provision the defendant Hathaway was subjected to confinement in jail pending the determination of his appeal.

It was argued in the Court of Criminal Appeals on the 29th day of January, 1896, and was not decided until the 24th day of June, 1896, leaving the defendant Hathaway in the meantime incarcerated in the McLennan County jail. On the last mentioned day the Court of Criminal Appeals decided the case, but did not pass upon the constitutionality of the act under which the indictment was framed, although that question had been raised in the court below and presented to the appellate court on the argument of the appeal. The court decided the appeal upon another ground, which the petitioner herein calls a technical ground of pleading, the court holding that because the indictment presented failed to charge Hathaway with knowingly carrying out as agent the stipulations, purposes, prices, etc., under the alleged conspiracy, the admission of evidence to that effect over the objection of the defendant was unwarranted in law, and the conviction was therefore invalid. The appellate court there-

upon reversed the judgment and remanded the cause for a trial *de novo*.

Since the rendition of this judgment two terms of the criminal court in the proper county have been held, one of which was drawing near its close at the time that the petitioner filed his petition, December 9, 1896, and the petitioner then makes this allegation: that "While this petitioner, together with his co-defendants who have been arrested and placed in recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his co-defendants not only to the shame and contumely of an indictment for felony, but denying to him and his co-defendants the right to be heard in his defence in said court as a citizen of the United States, and whereby this petitioner, as well as his co-defendants, are without remedy in the state courts of Texas for the assertion and vindication of their rights under the Constitution of the United States." It is then shown in the petition that on the 24th of November, 1896, Hathaway, one of his co-defendants, procured from the Circuit Court of the United States a writ of *habeas corpus*, requiring the sheriff of McLennan County, who then had him in custody, to produce the body of said Hathaway, and that the writ was served upon the sheriff, who made return that he held his prisoner under the indictment above mentioned.

A hearing before the court was then set for the 7th of December, 1896, and notice thereof was given to the sheriff and prosecuting officers of the county of McLennan, advising them of the proceedings and of the time when the matter would be inquired into. On the 7th of December, the state court dismissed the indictment and prosecution as against Hathaway, leaving the same to stand unimpaired as to the petitioner herein and his co-defendants. This action on the part of the state court, the petitioner charges, was for the purpose of defeating the jurisdiction of the United States court upon the writ of *habeas corpus*, which had then been issued,

and to thereby prevent that court from passing upon the constitutional rights of said Hathaway. After this discharge by the state court, the sheriff made return, setting up that fact and that he claimed no further right or custody over the relator.

The petitioner then avers that the act in question violates the Constitution of the United States for the reasons which he names, and that by reason of the premises "he is without remedy for the assertion and vindication of his rights as a citizen of the United States under the Constitution thereof; that he has stood under indictment for felony, charged with the violation of said alleged statute of the State of Texas, approved March 30, 1889, for the period of two years without being afforded an opportunity by the state courts of Texas for the assertion of his rights, as aforesaid, as a citizen of the United States. Your petitioner believes, and so avers, that it is the purpose and intent of the state authorities of the State of Texas to prevent, if possible, any appeal by this petitioner to the courts of the United States for the vindication of his rights as aforesaid as a citizen of the United States. In view of the premises herein recited and without the interposition of this honorable court for his due protection and the due conservation of his rights, as a citizen of the United States, he is practically remediless by an appeal in regular course or otherwise." The petitioner, therefore, asked for a writ of *habeas corpus* in order that he might be discharged from custody.

The writ having been duly served, the sheriff made return showing that he held the petitioner by virtue of a writ issued upon the indictment, and he further alleged that the authorities had been anxious and ready to accord all the defendants under the indictment that speedy trial which they were guaranteed under the constitution and the laws of the State of Texas; that the delay had come in great part from the action of the defendants; that at the first term of court after the indictment was presented, the case was set down for trial on the 14th of March, and was thereafter continued by agreement between the State and the defendants; that at the succeeding

September term the case was set down for trial on October 4, and on that day it was postponed upon motion of the defendants and set down for the November term, to be tried on the 2d of December, 1895, and that when the cause was called on that day the defendants, including the petitioner, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating a trial of the petitioner herein. The sheriff further returned that the purpose of the petitioner and his co-defendants was, as he believed, to defeat the jurisdiction of the courts of Texas in the administration of its laws; and that the relator and his co-defendants had agreed among themselves to have their several sureties surrender them into the custody of the sheriff, and that by their own acts and at their own request and by their own procurement the sureties of petitioner and his co-defendants did surrender them, and on the day of the surrender and contemporaneously with it a writ of *habeas corpus* from the Circuit Court was served upon the sheriff, commanding him to produce before the court *instanter* the body of petitioner.

Attached to the return were the affidavits of the sureties of the petitioner, in which they said in substance that the petitioner wanted them to surrender him to the sheriff on the day named, and that by his request they went to the lawyer's office and met the petitioner and accompanied him to the office of the sheriff, where they surrendered him to the sheriff.

The petitioner filed a replication which was in substance an admission of the truth of many of the allegations made in the return and the accompanying affidavits, but denied their materiality, and claimed that they furnished no answer to the allegations of the petitioner, as contained in his petition. The relator did deny that he had conspired or confederated for the purpose of defeating the jurisdiction of the courts of Texas or the administration of its laws; on the contrary, he alleged that for two years he and his co-defendants had submitted to the jurisdiction of the courts of Texas for the purpose of trial, and that when it became evident to the petitioner and his co-defendants that a trial was not to be had except at some

indefinite period in the future, if ever, then the petitioner "as a citizen of the United States proceeded to exercise his rights as such citizen and to call upon the courts of the United States to vindicate his rights as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purposes as indicated."

After hearing the parties, the Circuit Court decided that a proper case had been made out for its interference by virtue of the writ of *habeas corpus*, and thereupon held that the statute of the State of Texas called the anti-trust law was a violation of the Constitution of the United States, and, consequently, void. The court, therefore, discharged the petitioner, and from that order this appeal has been taken.

Mr. M. M. Crane for appellant.

Mr. George Clark and *Mr. Joseph H. Choate* for appellees. *Mr. John D. Johnson* and *Mr. D. C. Bolinger* were on *Mr. Clark's* brief. *Mr. S. C. T. Dodd* was on *Mr. Choate's* brief.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241; *Whitten* v. *Tomlinson*, 160 U. S. 231. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of

error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S. 372, and *In re Neagle*, 135 U. S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.

The ground for the discharge of the petitioner in this case, as given by the court below, was because of the opinion of that court that the anti-trust law of the State of Texas violated the Constitution of the United States, and was therefore void. The question of the validity of that act of course exists whether the case be in the state court or a hearing transferred to the Federal court by virtue of the writ of *habeas corpus*. It is the duty of the state court, as much as it is that of the Federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question, and to hold the law void if it violate that instrument. But the state court is not bound to decide the constitutional question when there are other grounds for reversing a conviction under the law, upon pain of having its omission furnish a ground for Federal interference.

The special circumstances creating what the court below regarded as a necessity for its immediate action, and which made the case one of urgency, are stated in the opinion of the court rendered in discharging the prisoner.

The first circumstance stated is that the Court of Criminal Appeals did not decide, when it had the opportunity, the question of the constitutionality of the act in question, and that that court, while deciding it was unnecessary to pass upon the constitutional questions raised, "referred favorably to the decisions of the Supreme Court of the State in which the anti-trust law had been sustained in this regard." It is matter of common occurrence — indeed, it is almost the undeviating rule of the courts, both state and Federal — not to decide constitutional questions until the necessity for such decision arises in the record before the court. This court has followed that practice from the foundation of the Government, and we can see no reason for just criticism upon the action of the state court in refusing to decide the question of the constitutionality of this act, when, at the same time, it held in substance that there was no evidence upon which to sustain the conviction of the defendant upon the indictment then before it, and that therefore the judgment should be reversed. In granting a new trial, it cannot properly be urged that the court failed to fulfil its duty towards the defendant in any degree whatever, because it did not decide the constitutional question as desired by him. The decision of the case was upon such a ground that the probability was that no conviction of the defendant could thereafter be had under that indictment. When the judgment of conviction was reversed the defendant Hathaway gave bail, and remained at large until the proceedings for his discharge were taken some six months after the judgment of reversal had been given.

Criticism is also made upon the fact that the state court did not discharge Hathaway after the decision upon his appeal until the Circuit Court issued the writ of *habeas corpus* some six months thereafter. It does not appear that Hathaway had applied to have his case tried, nor to be discharged from the indictment by reason of the decision granting him a new trial. However that may be, Hathaway's case was finished by his actual discharge, and it has no further bearing upon the action of the state court in this case.

It is also said that since the trial of Hathaway and the

granting of a new trial to him the case of the petitioner has not been called for trial, and that two terms of court since the granting of a new trial to Hathaway had come and the second one was about expiring at the time when the petitioner filed his petition in the Circuit Court for this writ. Here again there is no allegation and no proof that any attempt had been made on the part of this petitioner to obtain a trial in the state court or that he had been refused such trial by that court upon any application which he made. It is the simple case of a failure to call the indictment for trial, the petitioner being in the meantime on bail and making no effort to obtain a trial and evincing no desire by way of a demand that a trial in his case should be had.

We do not say that a refusal to try a person who is on bail can furnish any foundation for a resort to the Federal courts, even in cases in which a trial may involve Federal questions, but in this case no refusal is shown. A mere omission to move the case for trial (the party being on bail) is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities.

It was also stated that the petitioner could expect little better results on a trial of his case in the state court than obtained upon the trial in the *Hathaway case.* We think this statement is entirely without proof or even probability. The petitioner was indicted as one of several defendants under the same statute, and it is claimed that those of them mentioned in the indictment who resided in Texas were situated similarly to Hathaway. The probability, therefore, would be exceedingly strong that if the petitioner were tried upon the indictment found against him he would have to be acquitted by direction of the court for lack of evidence, under the decision of the Criminal Court of Appeals in Hathaway's case.

We are of opinion that neither one of the grounds taken by the court below nor all combined furnish any reason for the discharge of petitioner upon the writ issued by that court. The surrender of the petitioner by his bail at his request and

his consequent imprisonment furnishes in itself no ground of urgency for the interference of a Federal court. The imprisonment is entirely voluntary, and while the surrender by his bondsmen may be good for the purpose of avoiding any technical objection to the issuing of the writ founded upon the fact that the petitioner was on bail, yet the fact of imprisonment under such circumstances adds nothing to the strength of his case as calling for the interposition of the Federal court. This whole case is clearly nothing but an attempt to obtain the interference of a court of the United States when no extraordinary or peculiar circumstances exist in favor of such interference.

Upon the facts appearing herein, we think no sufficient case was made out for the exercise of the jurisdiction of the Circuit Court. We come to this decision irrespective of the question of the validity of the state statute and without passing upon the same or expressing any opinion in regard thereto.

If this application had been made subsequently to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, a different question would be presented and one which is not decided in this case, and upon which we do not now express any opinion.

The order of the Circuit Court for the Northern District of Texas must be reversed, and the case remanded to that court with instructions to set aside the order discharging the prisoner, and to enter an order remanding him to the custody of the sheriff.

In BAKER *v.* AUSTIN, No. 337; BAKER *v.* HAWKINS, No. 338; and BAKER *v.* FINLEY, No. 339, involving the same question and argued with this case, the same order is made.